Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,
Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2006, this Court vacated the judgment of the Supreme Court of Illinois in this cause and remanded the case to that court for further consideration in light of this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006). On remand, the Illinois court reaffirmed its prior decision, effectively holding that this Court's decision in *Jones* should be limited to its facts, or, at least, to the precise type of statutory scheme involved in *Jones*, so that notice and hearing were not constitutionally required prior to the complete and final extinguishment of the homeowner's property interest in this case. The Illinois court's failure to give this Court's decision in *Jones* its natural and proper effect raises the following questions, which now warrant review by this Court:

1. Whether the Due Process Clause requires that a homeowner be provided with notice of the judicial proceeding at which the title to her home, and all of her property interest in it, will be extinguished once and for all?

2. Whether the party responsible for providing a homeowner with constitutionally sufficient notice is free to ignore an undelivered, returned notice, which either reveals the homeowner's actual whereabouts or contains information that is reasonably likely to lead to the discovery of her whereabouts, simply because the party took some reasonable steps to provide the homeowner with actual notice before the new information came to its attention?

3. Whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may constitutionally foreclose a homeowner who did not receive actual notice of the proceeding from challenging, on federal constitutional grounds, the sufficiency of the efforts made to discover her whereabouts?

PARTIES TO THE PROCEEDING

Petitioner is the Estate of Mary Lowe, by Robert F. Harris, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe. Respondents are Apex Tax Investments, Inc. and John Herndon.

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PETITION FOR A WRIT OF CERTIORARI

The Estate of Mary Lowe by Robert F. Harris, Cook County Public Guardian and Supervised Administrator, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-29a) on remand from this Court, which is the subject of this petition, is reported as *In re Application of County Collector*, 867 N.E.2d 941 (Ill. 2007). This Court's order (Pet. App. 30a) granting petitioner's first petition for a writ of certiorari, vacating the prior judgment of the Supreme Court of Illinois, and remanding the case for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006), is reported as *Estate of Lowe v. Apex Tax Investments, Inc.*, 126 S. Ct. 2287 (2006). The now-vacated prior opinion of the Supreme Court of Illinois (Pet. App. 31a-73a.) is reported as *In re Application of County Collector*, 838 N.E.2d 907 (Ill. 2005). The order of the Appellate Court of Illinois, First Judicial District, affirming the Circuit Court of Cook County's denial of the petition to set aside tax deed (Pet. App. 74a-92a), is not reported. The memorandum opinion of the Circuit Court of Cook County granting partial summary judgment in favor of petitioner (Pet. App. 112a-17a) is not reported. The orders of the Circuit Court of Cook County denying petitioner's motion for summary judgment (Pet. App. 111a) and denying the petition to set aside tax deed (Pet. App. 93a) are not reported. The order of the Circuit Court of Cook County issuing the tax deed (Pet. App. 118a-20a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1 provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Section 22-15 of the Illinois Property Tax Code, 35 ILCS 200/22-15, provides in relevant part:

> The purchaser or his or her assignee shall give the notice required by § 22-10 by causing it to be published in a newspaper as set forth in § 22-20. In addition, the notice shall be served by a sheriff . . . upon owners who reside on any part of the property sold by leaving a copy of the notice with those owners personally.
>
> * * *
>
> The same form of notice shall also be served upon all other owners and parties interested in the property, if upon diligent inquiry they can be found in the county, and upon the occupants of the property in the following manner:
>
> (a) as to individuals, by (1) leaving a copy of the notice with the person personally or (2) by leaving a copy at his or her usual place of residence with a person of the family, of the age of 13 years or more, and informing that person of its contents. The person making the service shall also cause a copy of the notice to be sent by

> registered or certified mail, return receipt requested, to that party at his or her usual place of residence . . .
>
> * * *
>
> If any owner or party interested, upon diligent inquiry and effort cannot be found or served with notice in the county, then the person making the service shall cause a copy of the notice to be sent by registered or certified mail, return receipt requested, to that party at his or her residence, if ascertainable.

Section 22-40(a) of the Illinois Property Tax Code, 35 ILCS 200/22-40(a), provides in relevant part:

> If the redemption period expires and the property has not been redeemed . . . and the notices required by law have been given . . . and the petitioner has complied with all the provisions of law entitling him or her to a deed, the court shall so find and shall enter an order directing the county clerk . . . to issue to the purchaser or his or her assignee a tax deed. The court shall insist on strict compliance with §§ 22-10 through 22-25.

Section 22-45 of the Illinois Property Tax Code, 35 ILCS 200/22-45, provides in relevant part:

> Tax deeds issued under § 22-40 are incontestable except by appeal from the order directing the county clerk to issue the tax deed. However, relief from such order may be had under § 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under that Section with respect to final orders and judgments in other proceedings. The grounds for relief under § 2-1401 shall be limited to: . . .

(3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in § 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by §§ 22-10 through 22-30.

STATEMENT OF THE CASE

This petition for a writ of certiorari is the second filed in this case. In 2006, this Court granted the first petition, vacated the judgment of the Illinois Supreme Court, and remanded the case for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006). On remand, the Illinois court reaffirmed its prior decision, essentially holding that this Court's decision in *Jones* should be limited to its facts or, at least, to the precise type of statutory scheme involved in that case. The Illinois court held that due process does not require notice or hearing prior to the time that a homeowner's title and property interest are totally extinguished, so long as some effort at notice was made at the time of the tax sale two years before, and, further, that the party responsible for giving notice is entitled to ignore new information as to the owner's whereabouts, so long as some effort to find the owner previously had been made.

Background

In 1977, Mary Lowe purchased a single-family home located at 13250 South Riverdale in Cook County, Illinois.

(C 56.)[1] Ms. Lowe regularly paid all property taxes until 1991, when she failed to pay $110.65. (C 4.)

Ms. Lowe suffered from chronic disorganized schizophrenic disorder, and was hospitalized 27 times between 1964 and 1996. (SR II 25-26.) The death in 1994 of her companion, William Austin, triggered a renewed schizophrenic episode (EX 261); Ms. Lowe suffered the delusion that Mr. Austin was still alive, and she continued to live with his decomposing body until January 4, 1995, when the Chicago police found her walking naked outdoors and thereupon discovered Mr. Austin's remains. (C 29; EX 95-96.) Ms. Lowe was hospitalized, but later released to an outpatient treatment program. (EX 95-96, 130.) Ms. Lowe's final 16-month hospitalization, at Tinley Park Mental Health Center ("TPMHC"), a state mental hospital, lasted from August 26, 1995 until December 16, 1996. (SR II 26, 32; EX 96, 131.) It was during that period that respondent Apex Tax Investments, Inc. ("Apex") secured ownership of Ms. Lowe's home by prosecuting a petition for issuance of a tax deed in the Circuit Court of Cook County. (Pet. App. 118a-120a.) Ms. Lowe, who was released to the custody of her son on December 16, 1996, never received notice of the tax deed proceeding. (SR II 26, 32; EX 96, 131.) She died November 15, 1998, two days after her 72nd birthday. (C 57, 451.)

Ms. Lowe's mental illness was well-known in her neighborhood. (SR II 60-61, 83.) Jewel Hightower, a letter

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[1] The record consists of 10 volumes: a four-volume record consisting of a consecutively-paginated three-volume common-law record ("C") and a one-volume report of proceedings ("R"); a three-volume supplemental record containing a one-volume common-law record ("SR") and a nonconsecutively-paginated two-volume report of proceedings ("SRII" and "SRIII"); and a consecutively-paginated three-volume supplemental record containing the exhibits admitted in evidence at the evidentiary hearing of February 20, 2002 ("EX").

carrier whose route included Ms. Lowe's home from 1991 forward, was aware of Ms. Lowe's mental illness, as were Ms. Lowe's neighbors. (SR II 54-58, 60-61, 82-83, 85-87.) According to Ms. Hightower, Ms. Lowe exhibited a variety of strange behaviors, including coming outside undressed, shouting names and obscenities, moving her furniture to the curb, and screaming at passersby. (SR II 56-57, 60-61.) Such episodes often were followed by periods of hospitalization. (SR II 58.) Ms. Hightower would hold Ms. Lowe's mail during her hospitalizations. (SR II 58-59, 62, 82.) Until her last hospitalization in August 1995, Ms. Lowe would call the post office when she returned home, and Ms. Hightower would then deliver Ms. Lowe's mail. (SR II 58-59.)

Apex's Tax Deed Petition and Attempts at Giving Notice

On March 3, 1993, Apex purchased Ms. Lowe's home for $347.61, and received a "certificate of purchase," at a tax sale authorized by Articles 22 and 23 of the Illinois Property Tax Code, 35 ILCS 200/21-190 *et seq.* and 22-5 *et seq.* (the "Code"). (C 2, 4.)[2] Under the Code, Ms. Lowe was entitled to redeem the property by paying the unpaid taxes, plus certain expenses, before the redemption period expired on February 21, 1996. *See* 35 ILCS 200/21-345 through 21-355. The Code contains no requirement that any notice be given to a homeowner during the period between the time of the tax sale notice and the time of the notice of the filing of the tax deed petition, which is approximately 22 months.

On October 5, 1995, Apex filed a tax deed petition in the Circuit Court of Cook County. (C 2-4.) Apex was then

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[2] This amount included the amount of delinquent 1991 property taxes ($110.65), interest, and statutory fees. (C 4.)

required to comply with certain statutory notice provisions, including the publication of notice in a newspaper published within Cook County and service of notice by the Sheriff. *See* 35 ILCS 200/22-10 through 22-25. For purposes of effecting service, Apex was required by statute to undertake a "diligent inquiry" to locate the owner and other interested parties not residing on the property. *See* 35 ILCS 200/22-15.

On October 26, 1995, the Sheriff visited the property to effectuate service on Ms. Lowe, Mr. Austin (a co-owner), and "occupant." (C 11-13.) On November 9, 1995, the Sheriff filed with the Circuit Court a return of service reporting that he was unable to serve anyone at the property, which he reported to be "vacant per neighbors." (*Id.*) As required by statute, the Sheriff thereafter sent notices by certified mail addressed to the property and directed to Ms. Lowe, Mr. Austin, and "occupant" on November 8, 1995. (C 54-55.)

Ms. Hightower, the letter carrier, later testified that she became concerned when she received the Sheriff's letters because she recognized their potential importance. (SR II 64-65, 79-80.) Ms. Hightower knew that Ms. Lowe was hospitalized at TPMHC. (SR II 65, 75-76, 82.) Ms. Hightower duly recorded the fact of Ms. Lowe's hospitalization at the branch post office. (SR II 72, 82-84.)

Ms. Hightower marked the envelopes addressed to Ms. Lowe and "occupant" with her initials (JHT), her postal route number (2719), and the annotation "Person is Hospitalized", and returned them to sender after three delivery attempts. (C 54; SR II 66-70, 79.) She wrote "deceased" on the letter addressed to Mr. Austin and also returned it to sender. (C 15.) On November 22, 1995, the Sheriff filed the letter addressed to Mr. Austin with the court. (C 15.) He filed the other returned notices on January 2, 1996. (C 54.)

Fred Berke, the president of Apex, later testified that he visited the property sometime between September 21 and November 21, 1995. (Pet. App. at 113a.) No one answered the door. (*Id.* at 123a.) Mr. Berke looked in a window and noticed that the living room had no furniture. (*Id.*) He spoke with Ms. Lowe's next-door neighbor, who said that Ms. Lowe owned the property, but that no one was currently living there. (*Id.* at 124a.) In his *ex parte* testimony, Mr. Berke did not say whether he asked the neighbor how Ms. Lowe might be reached.

By reviewing a "print out tract search," a deed, and public records, Apex determined that Starks & Boyd, P.C., represented Ms. Lowe in 1993, when she quitclaimed a part interest in the property to Mr. Austin, and that First National Bank of Chicago had previously been a mortgagee. (*Id.* at 124a-25a.) The Sheriff served both parties between October 24 and 26, 1995. (Pet. App. at 125a; C 14.)

Apex caused the Clerk of the Circuit Court to send notices to Ms. Lowe, Mr. Austin, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago (the same parties served by the Sheriff) by certified mail on November 8, 1995. (Pet. App. at 125a-27a; C 6-10.) After unsuccessful delivery attempts on November 9, 15, and 24, the first three notices were returned by the Postal Service and filed by the Clerk of Court on November 29 and 30. (C 16, 547.)

Apex also gave notice by publication in The Chicago Daily Law Bulletin, a legal trade publication in Chicago, on October 11, 12, and 13, 1995. (Pet. App. at 126a.) Apex never personally served Ms. Lowe, who was hospitalized at TPMHC from August 26, 1995 until December 16, 1996.

The Tax Deed Hearing

On March 6, 1996, Apex filed an Application for an Order Directing the County Clerk to Issue a Tax Deed. (C 18.) On March 18, 1996, the Hon. Marjan Staniec held an *ex parte* hearing on the application. (Pet. App. at 121a-28a.)

The transcript of the *ex parte* proceeding is nine pages, including the title page. (*Id.* at 121a-28a.) Apex's attorney, Jonathan Smith, called Apex president Fred Berke as his only witness, and Mr. Berke's testimony consists of 34 lines. (*Id.* at 123a-24a.) Mr. Berke, who did not identify himself or explain his relationship to Apex, testified that he visited the property and spoke to Ms. Lowe's neighbor, who said that Ms. Lowe was the owner of the property, but that no one was living there. (*Id.*) Mr. Berke apparently did not ask the neighbor how Ms. Lowe could be reached, and he did not disclose the purpose of his visit. (*Id.*) He did not ask whether anyone else might know where to find Ms. Lowe. Nor did he inquire about Ms. Lowe's reputation in the neighborhood. (*Id.*)

Apex's lawyer then summarized Apex's attempts at notice. (*Id.* at 124a-27a.) He noted that the Sheriff had sent certified letters to Ms. Lowe and Mr. Austin after failing to obtain personal service on them. (*Id.* at 125a-26a.) Mr. Smith offered the returned envelopes in evidence, but made no mention of the notations as to Ms. Lowe's hospitalization or Mr. Austin's death. (*Id.*) Mr. Smith further asserted that no incompetents appeared to have an interest in the property. (*Id.* at 127a.) Judge Staniec admitted the envelopes in evidence, but did not inquire about the notations. (*Id.* at 126a.)

Judge Staniec asked one substantive question of Mr. Smith: "[W]hat were the diligent efforts you made to try to

locate the whereabouts of Mary Lowe and William Austin, Sr.?" (Pet. App. at 127a.) Mr. Smith responded:

> We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys, Starks and Boyd. We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

(*Id.*) Apex also determined that Ms. Lowe was registered to vote at her home. (*Id.* at 125a). Judge Staniec concluded that Ms. Lowe's redemption period had expired, that no redemption had occurred, and that Apex had exercised due diligence in ascertaining the identity of interested parties and their whereabouts. (*Id.* at 127a-28a.)

On May 20, 1996, Judge Staniec entered a written order, finding that Apex had met the statutory requirements for a tax deed and ordered its issuance.[3] (Pet. App. 118a-20a.) The Clerk issued the deed on the same day, and it was recorded on June 5, 1996. (EX 68-71.)

Proceeding to Set Aside the Tax Deed

On September 5, 1997, Ms. Lowe's two sons filed a *pro se* petition asking that the Circuit Court set aside the tax deed, based on Ms. Lowe's hospitalization at TPMHC. (C 23-24.) Judge Staniec then appointed the Public Guardian as Ms. Lowe's attorney and guardian ad litem. (C 541-44.)

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[3] After retiring, Judge Staniec gave an affidavit stating that he would not have granted Apex's application had he known of Ms. Hightower's notations. (C 541-42.)

On November 10, 1997, the Public Guardian filed a Petition to Set Aside Tax Deed and Stay Order of Possession under Section 2-1401 of the Illinois Code of Civil Procedure and Section 22-45 of the Property Tax Code. (C 29-32.) An Amended Petition was filed on April 17, 1998. (C 46-52.) The Public Guardian asserted that Apex had notice of Ms. Lowe's hospitalization by virtue of Ms. Hightower's notations on the returned letters. Apex, by failing to make any further inquiry of Ms. Hightower or the Postal Service, therefore failed to undertake the diligent inquiry required by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). (C 46-51.)

On December 6, 1996, Apex had entered into an installment sale contract with John Herndon, an associate of Mr. Berke (C 239-42, 299-300), who agreed to pay Apex $10,000 for Ms. Lowe's home. (C 85-92.) On August 12, 1998, John Herndon moved to dismiss the Public Guardian's petition. (*Id.*) On April 14, 1999, the Public Guardian moved for partial summary judgment, seeking a determination that Mr. Herndon was not a *bona fide* purchaser because his contract was executory and he had actual notice of Ms. Lowe's claim. (C 161-65.)

Judge Staniec granted the Public Guardian's motion after hearing arguments. (R 53-94). Judge Staniec concluded that Apex had actual or constructive knowledge, at the time of the March 18, 1996 *ex parte* hearing, that Ms. Lowe was hospitalized and had not received notice:

> Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it had exercised due diligence in reviewing the court file before the [March 18, 1996] prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would

> have noted the Post Office notation on the return envelope – and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by the Property Tax Code.

(Pet. App. at 114a-15a.) Judge Staniec further held that Apex's knowledge should be imputed to Mr. Herndon. (*Id.* at 116a.)

On September 17, 1999, after Judge Staniec retired, the Public Guardian moved for summary judgment on its Amended Petition. (C 370-76.) On February 16, 2000, Judge Nancy Arnold denied the motion and set the matter for trial. (Pet. App. 111a.) The case was tried by Judge Edward O'Brien on February 20, 2002. Only the Public Guardian presented evidence.

Jewel Hightower, the letter carrier, testified about Ms. Lowe's mental illness and bizarre behaviors, based on personal observations and on conversations with neighbors. (SR II 56-58, 60-61, 82-83, 86-87.) Ms. Hightower also explained how she marked the letters addressed to Ms. Lowe, Mr. Austin, and "occupant," which Apex offered in evidence at the *ex parte* tax-deed hearing. (SR II 64-71.) Ms. Hightower further testified that no one ever contacted anyone at the post office concerning the letters. (SR II 74-79.) If someone had asked her, she would have reported that Ms. Lowe was hospitalized at TPMHC, and the same information was available at the branch post office. (SR II 74-76, 80-81, 84.)

The Public Guardian also called Dr. Bernard Rubin, a psychiatric expert who had examined Ms. Lowe's health records. He testified that Ms. Lowe suffered from chronic disorganized schizophrenic disorder, the most severe form of schizophrenia. (SR II 18, 21-26, 31, 49, 104-105; EX 97-126.)

On April 9, 2002, Judge O'Brien denied the Amended Petition. (Pet. App. 93a; 94a-110a.) Judge O'Brien concluded that Ms. Lowe was hospitalized and incompetent, but that Apex could not be charged with knowledge of Ms. Lowe's mental illness simply by virtue of Ms. Hightower's notations. (*Id.* at 101a, 103a-104a.) Judge O'Brien did not upset Judge Staniec's prior finding that Apex was charged with knowledge that Ms. Lowe was hospitalized and had not received actual notice of the tax deed proceeding (*id.* at 103a), but nonetheless held that Ms. Lowe had not been denied due process because Apex had no reason to believe that Ms. Lowe was incompetent. (*Id.* at 100a, 103a-104a.)

Illinois Appellate Court Proceeding

On appeal to the Appellate Court of Illinois, First District, the Public Guardian argued that the notations put Apex on notice that Ms. Lowe was hospitalized and had not received actual notice, even if they did not establish incompetence. The Public Guardian also showed that Ms. Lowe's whereabouts were ascertainable through the exercise of constitutionally required diligence. (App. Ct. Br. 38-40.)

The Appellate Court affirmed. (Pet. App. 74a-92a.) Like the trial court, the Appellate Court concluded that Apex's knowledge of Ms. Lowe's hospitalization did not provide knowledge as to her mental incapacity. (Pet. App. 84a.) The Appellate Court did not consider whether Apex's knowledge of Ms. Lowe's hospitalization required it to undertake reasonable, additional investigation to ascertain her whereabouts.

The First Illinois Supreme Court Proceeding

On appeal to the Supreme Court of Illinois, the Public Guardian again urged that the notations put Apex on notice that Ms. Lowe was hospitalized, that Apex had a duty to

investigate further as to Ms. Lowe's whereabouts, and that any such investigation would have resulted in finding Ms. Lowe at TPMHC, therefore providing Apex with knowledge of Ms. Lowe's mental illness. (Ill. Sup. Ct. Br. 38.)

The court rejected these arguments. First, the court held that the Public Guardian had not made the showing of fraud or deception required to set aside a tax deed under Illinois statutory law. (Pet. App. 55a.) Second, the court held that it lacked the power under Illinois law to set aside the tax deed on equitable grounds. (Pet. App. 56a.) Third, the court, *sua sponte*, held that the trial court's *ex parte* finding of "diligent inquiry" (based on Illinois state standards) precluded any federal constitutional challenge to the sufficiency of Apex's efforts. (Pet. App. 67a.) Finally, the court categorically rejected all of the Public Guardian's other due process claims. (Pet. App. 68a-72a.)

The First Petition for a Writ of Certiorari

The Public Guardian filed a Petition for a Writ of Certiorari, raising three questions: (1) whether the Due Process Clause requires a person charged with giving notice to make additional efforts to locate a homeowner when mailed notice is returned as undeliverable; (2) whether a person charged with giving notice is required by the Due Process Clause to undertake additional reasonable efforts to provide actual notice when an undelivered, returned notice reveals specific information that is reasonably likely to lead to discovery of the homeowner's actual whereabouts or incapacity; and (3) whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may be used to foreclose a party who did not receive any actual notice of the proceeding from challenging the sufficiency, on federal constitutional grounds, of efforts to discover her whereabouts.

On May 22, 2006, the Court granted the petition, vacated the judgment of the Illinois court, and remanded for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006).

Illinois Supreme Court Proceeding on Remand

On remand, the Public Guardian argued that, in light of this Court's decision in *Jones*, the notice given to Ms. Lowe plainly violated the Due Process Clause because (1) Apex failed to follow up on specific information on the returned notices that likely would have led to the discovery of Ms. Lowe's whereabouts and incapacity, and (2) even absent the specific information, Apex did not make a constitutionally sufficient attempt to find Ms. Lowe. (Supp. Br. at 11-20.) The Public Guardian also argued that the Illinois court's previous holding that Ms. Lowe was precluded by state statute from challenging the constitutional sufficiency of Apex's attempts to give her actual notice was itself contrary to the Constitution. (Supp. Br. at 20-28.)

With only five of seven Justices participating, the Illinois court reaffirmed its prior decision. The court distinguished *Jones* on the ground that *Jones* involved notice of a tax sale rather than a proceeding to authorize issuance of a tax deed. (Pet. App. 17a-18a.) Although the record was silent as to whether Ms. Lowe received the notice of sale, the court concluded that "[b]ecause there is no issue in this case concerning whether Lowe was given notice of the tax sale, we find that the due process concerns in *Jones* are not at issue in this case and, therefore, that *Jones* does not require this court to reverse its prior opinion." (*Id.* at 18a.) The notice that Ms. Lowe failed to receive was notice of the expiration of the redemption period and initiation of a tax-deed proceeding that would extinguish her rights to the

property, both of which occurred approximately two years after the tax sale.

The Illinois court also held that Apex had complied with *Jones* in any event. The court concluded that the notations on the returned envelopes were not sufficient to require Apex, as a matter of federal constitutional law, to take additional reasonable steps to provide notice. (*Id.* at 19a-21a.) In the court's view, Apex had already taken reasonable steps to provide notice before the envelopes were returned, and was therefore entitled to ignore the new information. (*Id.* at 21a-23a.)

Finally, the court declined to revisit its previous holding that persons (like Ms. Lowe) who had not appeared at a tax-deed proceeding because they had not received notice of it, were nonetheless properly precluded by state law from challenging the federal constitutional sufficiency of the tax scavenger's efforts to give notice. (*Id.* at 23a.)

Justice Kilbride dissented. In his view, this Court's reasoning in *Jones* required reversal of the Illinois court's prior holding as to the constitutional sufficiency of Apex's efforts. Justice Kilbride agreed that *Jones* involved notice at an earlier stage of the deprivation of property, but found that the instant case presented an even stronger need for constitutional protection because this was the *last* stage at which the homeowner's property interest could be protected from final and irrevocable extinction. According to Justice Kilbride, the notice in this case was the last notice "before the owner is actually stripped of title to the property" and "provide[d] the *final opportunity* for the property owner to preserve *any interest* in the property." (*Id.* at 25a.) Justice Kilbride also pointed to the key factual similarity between *Jones* and this case: "In both instances, after it became apparent that the property owner had not received the

statutory notice, the party obliged to provide notice 'did – nothing'." (*Id.* at 26a (quoting *Jones*, 457 U.S. at 234).) After noting that "[t]he goal of due process is not to minimize the notification burden placed on the tax purchaser" (who frequently purchases property at a fraction of its value, as here), but to afford the homeowner an adequate opportunity to protect her property rights, Justice Kilbride concluded that additional reasonable steps to locate Ms. Lowe were constitutionally required once the envelopes were returned with the notation "person is hospitalized." (*Id.* at 29a.)

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER DUE PROCESS REQUIRES THAT A HOMEOWNER RECEIVE CONSTITUTIONALLY SUFFICIENT NOTICE OF THE HEARING AT WHICH THE STATE MAY TAKE HER HOME FOR NON-PAYMENT OF TAXES, AT WHICH POINT HER PROPERTY INTEREST MAY BE FULLY AND FINALLY EXTINGUISHED, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

The Illinois Supreme Court distinguished this Court's decision in *Jones* on the ground that *Jones* addressed the constitutional sufficiency of the notice given before the sale of Jones's house, whereas this case involves a challenge to the sufficiency of the notice given at a different stage, that is, at the time of the hearing, held two years after the tax sale, at which Ms. Lowe's title and property interest were fully and finally extinguished. (Pet. App. 17a-18a.)

In other words, the Illinois court concluded that minimum due process requirements are met if a party has notice of the first event affecting her property rights – the sale of her home at a tax sale – even though her ownership is not actually

extinguished until a separate hearing is held two years later.[4] However, *Jones* clearly applies to this case, and a homeowner is entitled to receive notice of the proceeding at which her property rights will be extinguished.

A. *Jones* Requires Summary Reversal Because, Under Illinois Law, A Homeowner's Property Is Actually Taken At The Tax-Deed Hearing, Not At The Tax Sale, And This Case Is Therefore Indistinguishable From *Jones*.

The central meaning of *Jones* is that reasonable efforts at giving notice must be made before a homeowner can be deprived of her property. In that respect, *Jones* reiterates the long-standing principle that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). It necessarily follows that notice must be given at the time that the property may be finally and irrevocably lost. *See, e.g., Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 484 (1988) ("[S]tate action affecting property must generally be accompanied by notification of that action"). That must be true, regardless of any prior notice that may have been given at any prior stage, because the proceeding in which title may finally and irretrievably be lost is the

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[4] In fact, the record does not show whether Ms. Lowe actually received notice of the tax sale. The Circuit Court found that Apex complied with the statutory provisions requiring that it send notice of the tax-deed petition near the end of the redemption period (Pet. App. at 118a), but the Circuit Court had no occasion to make any finding as to whether Ms. Lowe received notice of the tax sale, and no evidence regarding those notices was adduced at the tax-deed hearing. Moreover, whether Ms. Lowe received notice of the tax sale was not an issue in this case until it was raised *sua sponte* by the Illinois Supreme Court, at which time Ms. Lowe was deceased.

proceeding that affords the homeowner her "last clear chance" to preserve her property.

Jones makes clear that the actual taking of the property is a key event for due process purposes: "[B]efore forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." 547 U.S. at 234. *Jones*, then, is the most recent reiteration of this Court's consistent holding that giving notice of the proceeding at which the state will actually take property is a core due process requirement. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (notice must be given "at a time when the deprivation can still be prevented"); *Logan*, 455 U.S. at 434.

The Illinois court purported to distinguish *Jones* by relying on a difference between the Illinois statutes at issue in this case and the Arkansas statutes involved in *Jones*. But that difference is immaterial. In Illinois, as in many other states, the taking of a homeowner's property for delinquent taxes happens in two distinct steps. The first major step is the sale of the property at a tax sale after which the purchaser of the property receives a "certificate of purchase." 35 ILCS 200/21-205, 21-250. The tax sale triggers a 30-month redemption period. The homeowner may redeem the property by paying back taxes, along with certain penalties and interest. *See* 35 ILCS 200/21-345 *et seq.*

The last step in Illinois is the tax scavenger's filing and prosecution of a petition for issuance of a tax deed near the

end of the two-year redemption period. 35 ILCS 200/22-30. The Illinois statute requires the tax scavenger to make "diligent inquiry" to locate the homeowner and to send notice of the petition, including the date on which the court will hear the petition, between three and five months before the expiration of the redemption period. 35 ILCS 200/22-10 *et seq.* If the homeowner did not receive notice and does not appear, the hearing may be conducted *ex parte*. The Circuit Court orders the issuance of a tax deed so long as the tax scavenger shows: (a) that the redemption period has expired, (b) that all taxes and special assessments have been paid, and (c) that there has been strict compliance with the statutes requiring notice of the tax-deed petition. 35 ILCS 200/40(a). The deed is incontestable except on four narrow statutory grounds. 35 ILCS 200/45.

The Arkansas statutes in *Jones* required that the Commissioner of State Lands, at the beginning of a two-year redemption period, send a notice to the affected homeowner stating that his property will be sold if it is not redeemed within the two-year period. *See* Ark. Code Ann. § 26-37-301 (1997); *Jones*, 547 U.S. at 223. At the end of the two-year redemption period, the property may be sold and, after a brief, 30-day post-sale redemption period, the Commissioner will issue a tax deed as a matter of course. Ark. Code Ann. § 26-37-202(e) (1997), *Jones*, 547 U.S. at 224. Arkansas had no statutory requirement that a second notice be sent shortly before the sale actually occurs and the homeowner's property interest is extinguished.[5]

The two schemes are different in that the tax sale and issuance of a tax-deed are separated by a 30-month redemption period in Illinois, but constitute a single event at

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[5] Arkansas amended its statutes in 2003, but the tax sale at issue in *Jones* was governed by the pre-amendment version of the statutes.

the end of the two-year redemption period in Arkansas. However, that distinction has no legal significance here. As the Illinois Supreme Court acknowledged in its opinion, "[t]he certificate of purchase [issued at the tax sale] did not affect Lowe's legal or equitable title to the property." (Pet. App. 4a.) Rather, the actual taking occurred at the conclusion of the tax-deed petition, after the expiration of a 30-month redemption period – the very events as to which Ms. Lowe received no notice. Under the Arkansas statutes, by contrast, the tax-sale is the actual taking because the state issues automatically a tax deed that extinguishes the homeowner's property rights 30 days after the sale. *See* Ark. Code Ann. § 26-37-202(e).

This Court's holding in *Jones* clearly applies to this case because the state extinguished Ms. Lowe's remaining interest in her property by issuing an incontestable tax deed at the tax-deed proceeding. The Illinois court's conclusion that *Jones* does not apply because the *Jones* notice pertained to a tax sale rather than a tax deed is plainly incorrect and warrants summary reversal.

B. If *Jones* Itself Is Limited To Tax Sales, This Court Should Grant Review To Resolve A Split In The Lower Courts On Whether Due Process Requires Notice Of The Tax-Deed Proceeding In Addition To Any Notice Of The Tax Sale.

Even if the Illinois court's narrow reading of the holding in *Jones* were correct, the principle animating *Jones* clearly requires reversal. But the Court appears to have reserved that issue, as a technical matter, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and the lower courts are split on that question. Thus, if this Court believes that the Illinois court is technically correct as to the scope of the *Jones* holding, this Court should grant review to resolve that

remaining uncertainty and hold that, in states that use a two-stage process like Illinois', due process requires notice of both the tax sale and the later tax-deed proceeding.

In *Mennonite*, this Court addressed a statutory scheme nearly identical to that involved here. Mennonite Board, the mortgagee, did not receive notice of either the tax sale or the filing of an application for the issuance of a tax deed at the conclusion of the redemption period. *Mennonite Board*, 462 U.S. at 794-95. After Adams (the tax purchaser) received the tax deed, he filed a quiet title action, which Mennonite Board opposed, arguing that "it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale." *Id.* at 795. This Court found that the tax sale "immediately and drastically diminished the value" of Mennonite's interest in the property, and that Mennonite was therefore constitutionally entitled to notice of the tax sale. *Id.* at 798. Because the Court held that Mennonite's due process rights had been violated at the first stage, the Court had no reason to decide whether due process required that notice also be afforded at the second stage. The Court therefore reserved judgment on that issue. *Id.* at 800 n.6.

Prior to this Court's decision in *Jones*, the Indiana Supreme Court held, with respect to the same statutory scheme, that "the due process clause . . . does not require that actual notice be given of either the lapse of the redemption period or the subsequent issuance of the tax deed." *Calhoun v. Jennings*, 512 N.E.2d 178, 184 (Ind. 1987). Several other states have reached the same conclusion. *See Weigner v. City of New York*, 852 F.2d 646, 652 (2d Cir. 1988) ("[D]ue process only requires notice of the 'pendency of the action' and an opportunity to respond" and does not require notice of the end of the redemption period and the final proceedings

terminating property rights); *Hamilton v. Royal Int'l Petroleum Corp.*, 934 So. 2d 25, 32 (La. 2006), *cert. denied*, 127 S. Ct. 937 (2007) (holding that post-sale notice is not constitutionally required because "[t]he notice informing the property owner his taxes are delinquent and his property will be sold if the taxes are not paid protects the procedural due process rights of the property owner"); *Cummings v. Town of Oakland*, 430 A.2d 825, 832 (Me. 1981) ("When the state gratuitously provides by statute for an additional warning by notice of 'impending automatic foreclosure' as was done here, that second notice is not itself of constitutional magnitude . . . .").

The New Hampshire Supreme Court, on the other hand, could "not see how due process [could] be read, as in *Mennonite*, to require actual notice . . . of a tax sale, but not to require notice, as here, of a tax deeding" because the "end of the redemption period . . . is an event that has far greater significance to both the owner and the mortgagee. When the redemption period lapses, the holder of the lien is entitled to exchange the lien for a tax deed, thereby acquiring the property free and clear of all other interests." *First NH Bank v. Town of Windham*, 639 A.2d 1089, 1094 (N.H. 1994). The New Hampshire court ultimately held that "fundamental fairness under the New Hampshire Constitution" required notice of the final proceeding. *Id.* at 1095.

Other courts have concluded that federal due process requires notice of the proceeding at which the homeowner's property rights will be finally extinguished. *See Vosilla v. Rosado*, 944 So. 2d 289, 299-301 (Fla. 2006) (applying *Jones* to the tax collector's attempts to serve notice of final proceedings at end of redemption period); *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 83-84 (Ga. 2003) (holding that "[n]otice of the tax sale and notice of the

foreclosure of the right to redeem are distinct events" and both are subject to due process); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 603 A.2d 484, 486-87, 491 (Md. 1992) (applying federal due process standards to final stage terminating right of redemption and extinguishing property rights); *In re Foreclosure of Liens for Delinquent Taxes*, 607 N.E.2d 1160, 1163 (Ohio Ct. App. 1992) (holding that mortgagee was constitutionally entitled to notice of tax foreclosure sale even though the mortgagee had earlier notice of the pendency of the foreclosure proceeding); *see also Acirema, N.V. v. Lilly*, No. 96-0559, 1997 WL 876738 *4 (S.D.W. Va. April 11, 1997), *aff'd*, 141 F.3d 1157 (4th Cir. 1998) (holding that failure to provide notice of tax sale did not offend due process where actual post-sale notice of right to redeem before final termination of property rights).

In sum, under the due process principles reaffirmed in *Jones*, Ms. Lowe was entitled to constitutionally adequate notice of the tax-deed proceeding, even if she received notice of the tax sale more than two years before. The right to notice and hearing clearly attaches to a proceeding at which a person's property interest will be extinguished. The Illinois court's contrary holding is clearly incorrect and warrants summary reversal by this Court. Alternatively, if the Court concludes that the precise issue presented in this case was left open in *Mennonite* and not addressed with sufficient directness in *Jones*, the Court should take this opportunity to further clarify the law in this area, and resolve the continuing split in the lower courts, either by granting plenary review, or simply by issuing an opinion to reiterate the primacy of *Jones* in this area.

II. THE QUESTION WHETHER THE PARTY REQUIRED TO PROVIDE CONSTITUTIONALLY SUFFICIENT NOTICE MAY IGNORE AN UNDELIVERED, RETURNED NOTICE, WHICH CONTAINS NEW INFORMATION, SIMPLY BECAUSE THE PARTY TOOK SOME REASONABLE STEPS TO PROVIDE ACTUAL NOTICE BEFORE THE NOTICE WAS RETURNED, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

On remand, the Illinois court was "not convinced that . . . Apex was required to take additional steps in response to Hightower's notations on the certified mail envelopes." (Pet. App. 21a.) The Illinois court held that *Jones* did not require reasonable additional steps based on the new information – the notations on the returned envelopes that "person is hospitalized" together with the letter carrier's initials and route number – because Apex previously had taken some reasonable steps to provide notice before receiving the new information. (*Id.* at 19a-23a.)

That holding cannot be reconciled with *Jones*. In *Jones*, this Court reaffirmed that due process requires that "any proceeding which is to be accorded finality" requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and employs "means . . . such as one desirous of actually informing the absentee might reasonably adopt to accomplish [giving notice]." *Mullane*, 339 U.S. at 314, 315.

Sharpening the *Mullane* inquiry in *Jones*, the Chief Justice noted that it would not be reasonable for the tax collector to do nothing if, for example, he saw the letter carrier accidentally drop a stack of notices down a storm

drain, and therefore knew that the notices had not been delivered:

> No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable . . . .

547 U.S. at 229. In other words, the fact that someone has taken reasonable steps to give notice cannot, as a constitutional matter, excuse him from attempting additional steps once he knows those initial steps failed.[6] Moreover, *Jones* specifically considers what additional steps reasonably may be required because of the information garnered from the returned notice. *Jones*, 547 U.S. at 234 ("What steps are reasonable . . . depends upon what the new information reveals.") Here, the Illinois court held the opposite: that Apex was excused from any constitutional duty to follow up on new information simply by virtue of certain steps it took before receiving the new information. The Illinois court's disregard of this Court's decision could not be more direct.

The notations provided by Ms. Hightower are precisely the sort of information that requires additional steps:

> Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and

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[6] As noted in *Jones*, "[t]here is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them." 547 U.S. at 239. The Court's observation suggests that, in evaluating what steps are reasonable and necessary, it is useful to consider whether one who is owed money (as opposed to one who hopes to acquire property at a bargain price if the owner remains unfound) would take those steps to collect the debt that he is owed.

> leave it for the postman to retrieve, or notify Jones directly.

Jones, 547 U.S. at 235. The notations clearly indicated that Ms. Hightower knew Ms. Lowe's whereabouts. Moreover, Ms. Hightower testified that she would have communicated that information to anyone who asked. (SR II 64-84.) All Apex needed to do was to contact Ms. Hightower. If Apex was aware of Ms. Hightower's notations, and the trial court concluded it was (Pet. App. 114a-15a), it had a constitutional obligation to follow up on them.

Apex's "reasonable steps" were all undertaken in 1995 *before* the letters with the notations were returned. As Justice Kilbride noted in dissent, once the letters were returned with the "person is hospitalized" notation, along with Ms. Hightower's route number and initials, Apex "'did – nothing'." (Pet. App. at 26a. (quoting *Jones*, 547 U.S. at 234).) When the letters were returned, Apex already knew that Ms. Lowe was not living at that address, and that its previous efforts to locate her had been unsuccessful. Yet it did nothing with this new information. Clearly, it would have done *something* if it truly desired to find Ms. Lowe, and was not simply desirous of making a record to justify obtaining a deed to her property for a bargain basement price at a perfunctory, *ex parte* proceeding.

Finally, the Illinois court's application of *Jones* cannot be reconciled with that of other courts. For example, the First Circuit, concluding that *Jones* "held that the government was required to take some reasonable follow-up measures . . . when it learned its initial attempt had failed," held that if "the government has easy access to a lead that it knows (or reasonably should know) is potentially fruitful, it has some duty to elicit the available information and take reasonable action in response to it." *United States v. One Star Class*

Sloop, 458 F.3d 16, 23 n.7, 24 (1st Cir. 2006). Similarly, the Missouri Supreme Court observed that "*Jones* concluded that the government's knowledge that notice was ineffective triggered an obligation to take additional steps, if practicable, to effect notice." *Conseco Fin. Servicing Corp. v. Mo. Dept. of Rev.*, 195 S.W.3d 410, 417 (Mo. banc 2006). *See also Luessenhop v. Clinton County, New York*, 466 F.3d 259, 270 (2d Cir. 2006) (*Jones* requires additional reasonable steps based on new information garnered from the returned notices); *Vosilla*, 944 So. 2d at 300 (*Jones* requires consideration of "unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances").

In sum, the Illinois court interpreted and applied *Jones* in a manner inconsistent with both the central holding of *Jones*. The petition should be granted and the judgment below reversed.

III. THE QUESTION WHETHER A STATE STATUTE MAY PRECLUDE A HOMEOWNER WHO DID NOT RECEIVE ACTUAL NOTICE OF THE TAX DEED PROCEEDING, AT WHICH HER PROPERTY RIGHTS WERE EXTINGUISHED, FROM CHALLENGING THE SUFFICIENCY OF THE NOTICE OF THAT PROCEEDING ON FEDERAL CONSTITUTIONAL GROUNDS, IS AN ADDITIONAL QUESTION WARRANTING REVIEW.

On remand, the Illinois court adhered to its prior holding that the trial court's *ex parte* state law finding of "due diligence" could not be challenged in this proceeding because Ms. Lowe was precluded as a matter of state statute from challenging the federal constitutional sufficiency of Apex's

efforts to give her notice. (Pet. App. 23a) The Illinois court ostensibly declined to revisit its previous *sua sponte* holding on the ground that its "reconsideration of Apex's diligent inquiry . . . is limited to whether Apex's notice to Lowe satisfied due process under *Jones*." (*Id.*) But the question whether the Illinois statute precludes due process claims like Ms. Lowe's is necessarily encompassed within that broader question, and is therefore within the scope of the remand.[7]

At all events, Ms. Lowe could not object to lack of notice at the time of the trial court's *ex parte* hearing for the simple reason that she was not there – a result of Apex's failure to take adequate steps to ensure that she received notice of the proceeding. To hold that she is barred by her failure to object in such circumstances is both nonsensical and contrary to prior decisions of this Court, which establish that a party may not constitutionally be deprived of the opportunity to contest the sufficiency of notice by virtue of not having received notice in the first instance. *Logan*, 455 U.S. at 429-30 (stating that the Due Process Clause prohibits the States from denying a litigant access to "adjudicatory procedures when such action would be the equivalent of denying them an opportunity to be heard upon their rights"); *see also Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Other state courts that have addressed the precise question presented here have held that "allowing for the deprivation of property without any redress would be

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[7] The Illinois court's refusal to acknowledge that point simply underscores the extent of its unwillingness to give effect to a decision of this Court with which it appears to disagree. If Ms. Lowe's federal constitutional claim were (or could be) barred by a state statute, the Illinois Supreme Court would have dismissed the case on that ground. Of course, it did not do so.

patently unconstitutional." *In re Petition by Treasurer of Wayne County*, 732 N.W.2d 458, 462-63 (Mich. 2007); *accord In re Foreclosure of Liens for Delinquent Taxes*, No. 2002-CA-99, 2003 WL 1795569 *3 (Ohio Ct. App. April 4, 2003); *Beneficial Ohio, Inc. v. Primero*, L.L.C., 851 N.E.2d 510, 512 (Ohio Ct. App. 2006). *See also Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 945 (9th Cir. 2006) (holding post-*Jones* that the denial of due process in failing to provide notice also denies due process because it denies the opportunity to appeal).

In sum, the petition should be granted and the judgment below reversed.

CONCLUSION

Petitioner respectfully suggests that the Court grant the petition and summarily reverse the judgment of the Supreme Court of Illinois as to all three questions presented. Alternatively, petitioner requests that the petition be granted and the case set down for plenary consideration.

Respectfully submitted,

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July 13, 2007

Appendix A

Supreme Court of Illinois

In re APPLICATION OF THE COUNTY COLLECTOR for Judgment and Sale Against Lands and Lots Returned Delinquent for Nonpayment of General Taxes and/or Special Assessments for the Years 1991 and Prior Years (Apex Tax Investments, Inc., *et al*, Appellees, v. Mary Lowe, Deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Appellant).

No. 97165.

April 19, 2007.

Chief Justice THOMAS delivered the judgment of the court, with opinion:

Justice KILBRIDE dissented, with opinion.

OPINION

This cause is before us on remand from the United States Supreme Court for further consideration in light of *Jones v. Flowers*, 547 U.S. ___, 164 L. Ed. 2d 415, 126 S. Ct. 1708 (2006). We have allowed additional briefing and oral argument addressing the Supreme Court's decision in *Jones*. We also have permitted the Mental Health Association in Illinois and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic to file a brief *amici curiae* on behalf of the Cook County public guardian, as supervised administrator for the estate of Mary Lowe. In addition, we have permitted the Illinois Tax Purchasers Association to file a brief *amicus curiae* on behalf

of Apex Tax Investments, Inc., and its subsequent transferee and claimed beneficial interest holder, John Herndon.

The facts in this case are set forth in the original opinion of this court (*In re Application of the County Collector*, 217 Ill. 2d 1 (2005)). We repeat those facts in some detail in this opinion, as those facts are relevant to our reconsideration in light of *Jones*.

BACKGROUND

In 1977, Mary Lowe purchased a single-family home located at 13250 South Riverdale in Chicago. In 1993, Lowe quitclaimed the property to herself and William Austin. Austin died in 1994. Property taxes were paid on the home until 1992, when $110.65 in assessed taxes for the 1991 property tax year went unpaid.

Once property taxes become delinquent, the Property Tax Code (the Code) (35 ILCS 200/1-1 *et seq.* (West 1994)) provides that the county collector may file an application in the circuit court for judgment and order of sale of the delinquent property. The Code directs that the county collector shall publish notice of its intent to file an application for judgment. 35 ILCS 200/21-110 (West 1994). The notice must be published in a newspaper in the township where the property is located at least 10 days before the application is filed. 35 ILCS 200/21-115 (West 1994). In addition, the county collector shall send a notice of the application for judgment and sale, by certified or registered mail, to the person in whose name the taxes were last assessed at least 15 days before the date of the application for judgment and sale of the delinquent property. 35 ILCS 200/21-135 (West 1994). The county collector must present proof of the mailing to the court along with the application for judgment. 35 ILCS 200/21-135 (West 1994). The

property owner can pay the delinquent taxes and costs any time prior to the sale. 35 ILCS 200/21-165 (West 1994). If judgment is entered against the property, the county collector shall offer the property for sale pursuant to the judgment. 35 ILCS 200/21-190 (West 1994).

Following a tax sale, the Code provides that, in order to seek a tax deed, the tax purchaser must deliver a notice to the county clerk to be given to the party in whose name the taxes were last assessed. 35 ILCS 200/22-5 (West 1994). This notice must be delivered to the county clerk within five months after the tax sale, and the county clerk must mail the notice, within 10 days of receipt, by registered or certified mail. 35 ILCS 200/22-5 (West 1994). This section 22-5 "Take Notice" advises a party that his property has been sold for delinquent taxes, that redemption can be made until a specified date, and that a petition for tax deed will be filed by the tax purchaser if redemption is not made. 35 ILCS 200/22-5 (West 1994).

The Code provides for a second "Take Notice" to be sent to the owners, occupants and parties interested in the delinquent property not less than three months or more than five months prior to the expiration of the period of redemption. 35 ILCS 200/22-10 (West 1994). This section 22-10 take notice must give notice of the sale and the date of expiration of the period of redemption. 35 ILCS 200/22-10 (West 1994). The section 22-10 take notice must be served: personally by the sheriff; by registered or certified mail, return receipt requested; and by three publications in a newspaper. 35 ILCS 200/22-15, 22-20, 22-25 (West 1994).

Also "within 5 months but not less than 3 months prior to the expiration of the redemption period," the tax purchaser may file a petition in the circuit court seeking an order directing the county clerk to issue a tax deed to the property.

See 35 ILCS 200/22-30 (West 1994). In order to receive an order issuing a tax deed, the redemption period must expire without any redemption taking place, and the tax purchaser must prove to the circuit court that it has strictly complied with the statutory notice provisions set forth in sections 22-10 through 22-25 of the Code (35 ILCS 200/22-10 through 22-25 (West 1994)). 35 ILCS 200/22-30 (West 1994).

In this case, the circuit court granted the collector's application for judgment and sale. The county collector offered Lowe's home for sale and, on March 3, 1993, Apex Tax Investments, Inc. (Apex), purchased the home at the annual Cook County tax sale for $347.61, the amount of the 1991 tax delinquency and fees. Apex did not receive title to the property at that time, but instead received a "certificate of purchase." See 35 ILCS 200/21-250 (West 1994). The certificate of purchase did not affect Lowe's legal or equitable title to the property. In addition, Lowe had the right to redeem the property, upon payment of the tax arrearage and costs, until the redemption period expired. See 35 ILCS 200/21-345 through 21-355 (West 1994).

On October 5, 1995, Apex filed a petition in the circuit court of Cook County for a tax deed to the property. Apex's tax petition stated that the redemption period expired by extension on February 21, 1996. Because no redemption occurred by February 21, 1996, Apex's petition proceeded to an *ex parte* hearing on March 18, 1996.

At the March 18, 1996, hearing, Apex's attorney testified concerning Apex's compliance with the statutory notice provisions of sections 22-10 through 22-25 of the Code. Apex conducted a tract search and learned that the property at issue was owned by Mary Lowe and William Austin. Apex conveyed this information to the Cook County sheriff and the clerk of the circuit court of Cook County. Pursuant

to section 22-15 of the Code (35 ILCS 200/22-15 (West 1994)), the Cook County sheriff attempted to personally serve Lowe, Austin and "occupant" with the section 22-10 "take notice" on October 26, 1995. The Cook County sheriff filed the returns of service for the section 22-10 take notices with the clerk of the circuit court on November 9, 1995. On each return of service, the deputy sheriff wrote "House vacant per neighbors." In addition, the deputy sheriff wrote the word "MOVED" on the preprinted form to indicate the reason why notice was not served.

Because the Cook County sheriff could not effect personal service on Austin, Lowe or "occupant," the sheriff also sent section 22-10 take notices to Austin, Lowe and "occupant" at the property's address by certified mail, return receipt requested. The three certified mail notices were returned to the sheriff undelivered, and were filed with the clerk of the circuit court.

The envelopes for the three certified mail notices were admitted into evidence at the hearing on Apex's petition for a tax deed. All three envelopes were postmarked November 8, 1995, and were stamped "return to sender." On the envelope addressed to Austin, the word "deceased" was handwritten in pencil on the left side of the envelope. The envelopes addressed to Lowe and "occupant" contained stamps indicating that attempts were made to deliver the notices on November 16, December 11, and December 18, 1995. In addition, the two envelopes addressed to Lowe and "occupant" contained a handwritten notation written vertically on the left side of the envelope which read, "Person is Hospitalized." Under that notation, the number "2719" and the letters "JHT" were handwritten. The handwritten notations on the envelopes have a line drawn through them and are obscured in part by the circuit court clerk's filing stamp and the post office's "return to sender" stamps. The

sheriff filed the returned certified mail notice for Austin with the court on November 22, 1995, and filed the returned certified mail notices for Lowe and "occupant" with the court on January 2, 1996.

Pursuant to statute, the clerk of the circuit court of Cook County also sent section 22-10 take notices by certified mail to Lowe, Austin and "occupant." These notices were returned undelivered. The three certified mail envelopes were postmarked November 8, 1995, and were stamped "return to sender." The three envelopes contained notations indicating that attempts were made to deliver the notices on November 9, November 15, and November 24, 1995. Apex also provided publication notice to Lowe and Austin by publishing notice in the Chicago Daily Law Bulletin on October 11, October 12, and October 13, 1995.

At the hearing on Apex's petition for tax deed, Apex's attorney testified that, in attempting to ascertain the whereabouts of Lowe and Austin, the Cook County sheriff personally served a section 22-10 take notice on the law firm that prepared the 1993 quitclaim deed on behalf of Lowe. The clerk of the circuit court also sent notice to the law firm by certified mail on November 8, 1995. Moreover, the First National Bank of Chicago, in its capacity as a mortgagee of the property, was personally served with a section 22-10 take notice on October 24, 1995. Likewise, the clerk of the circuit court sent notice by certified mail to the bank on November 8, 1995.

Apex's agent, Fred Berke, testified at the hearing that he had visited the property and inspected it on behalf of Apex sometime between October 21 and December 21, 1995. When Berke arrived at the home, he knocked on the door and looked into the living room window. Berke did not see any furniture inside the home. In addition, Berke spoke to a next-

door neighbor who told Berke that the owner of the property was the "Lowes," but that no one was living there currently. Berke testified that the home appeared to be uninhabited.

Apex's attorney also testified that Apex checked city and suburban phone directories and voter registration records, but was unable to develop any address for William Austin or Mary Lowe other than the subject property address. Apex's attorney stated that all regular efforts to locate Lowe and Austin had proven fruitless.

At the close of the hearing on Apex's petition for tax deed, the circuit court found that no redemption had been made, that Apex had complied with the notice provisions of the property Tax Code, and that Apex had exercised "due diligence" in attempting to locate Lowe and Austin. Consequently, on May 20, 1996, the circuit court directed the county clerk to issue Apex a tax deed to the property. The tax deed was issued on May 20, 1996.

Subsequently, on December 6, 1996, Apex entered into an installment contract to sell the property to third-party John Herndon for $ 10,000. Herndon testified via deposition that the property was in substantial disrepair when he purchased it, describing the home as an abandoned building. Herndon invested more than $20,000 in material and labor in renovating the property, completing the renovations by early 1998.

On September 5, 1997, two of Mary Lowe's sons, Bruce and Mario Lowe, filed a *pro se* petition for "Restoration of Property Ownership" in the circuit court of Cook County, stating that Mary Lowe had been in and out of various mental facilities for the past 30 years and that Lowe had been hospitalized in a mental-health facility from August 26, 1995, to December 17, 1996. The petition stated that Mary Lowe

had been released to Bruce Lowe's custody and that Mary currently resided with Bruce in California. The *pro se* petition alleged that personal service on an incompetent person violates that person's right to due process. The petition therefore asked that the court reinstate Mary's full rights of ownership in the subject property.

Based upon the allegation that Mary Lowe was mentally disabled, the circuit court on November 1997 appointed the Cook County public guardian to represent her.[1] The public guardian then filed a petition, and later an amended petition, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 512—1401 (West 1994)) and section 22-45 of the Code (35 ILCS 200122-45 (West 1994)), seeking to have the tax deed that was issued to Apex set aside. The public guardian alleged the Mary Lowe suffered from schizophrenia and had been hospitalized at the Tinley Park Mental Health Center at the time the section 22-10 notices were sent to the property in November 1995. The public guardian also noted that two of the notices mailed by the Cook County sheriff were returned with the notation "Person is hospitalized 2719 JHT" written on the envelopes. The public guardian alleged that the notations were written by mail carrier Jewel Hightower. The number 2719 was Hightower's postal route numbers and the letters "JHT" were Hightower's initials. The public guardian contended that Apex failed to make diligent inquiry concerning the whereabouts of Mary Lowe because Apex never attempted to contact Hightower or the post office.

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[1] Mary Lowe died on November 15, 1998. The probate division of the circuit court of Cook County entered an order appointing the public guardian as administrator to collect for the estate of Lowe, and the public guardian, as administrator to the estate of Mary Lowe, was substituted as the proper party to prosecute the amended petition to set aside the tax deed.

An evidentiary hearing on the public guardian's amended petition to set aside the tax deed was held on February 20, 2002. The circuit court allowed Herndon to participate at the hearing because he had purchased the subject property. Dr. Bernard Rubin testified at the hearing that he had reviewed Lowe's mental-health records and concluded that Lowe had suffered from disorganized, chronic schizophrenic disorder. Rubin said that from January 1995 until October 1996, Lowe suffered from a mental illness, was generally incompetent, and would not have been able to understand or respond to legal documents served upon her between January 1995 and October 1996.

Hightower also testified at the evidentiary hearing that she was a mail carrier for the United States Postal Service and that the property at issue was on her route. She wrote "Person is Hospitalized" on the certified letters sent by the sheriff to Lowe and occupant. Hightower also wrote her postal route number, "2719," and her initials, "JHT," on the envelopes. At the time she made the notations on the envelopes, Hightower knew that Lowe was in Tinley Park Mental Health Center, but postal regulations did not allow her to note anything more specific than the fact that an addressee was hospitalized. Hightower testified that anyone wanting further information concerning Lowe's whereabouts could have come to the post office and filled out the proper forms, although Hightower did not further explain what forms would authorize disclosure that a person was hospitalized in a mental-health facility.

On April 9, 2002, the circuit court denied the public guardian's amended petition to set aside the tax deed. The appellate court affirmed. No. 1-02-1101 (2003) (unpublished order under Supreme Court Rule 23). This court granted the public guardian's petition for leave to appeal and affirmed the circuit and appellate courts.

In affirming, this court noted that relief from an order issuing a tax deed could be had under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)), but that the grounds for relief were limited as set forth in section 22-45 of the Code (35 ILCS 200/22-45 (West 1994)). *In re Application of the County Collector*, 217 Ill. 2d at 25-26. These grounds are limited to: (1) proof that the taxes were paid prior to the sale; (2) proof that the property was exempt from taxation; (3) proof by clear and convincing evidence that the tax deed was procured by fraud or deception; or (4) proof by a person or party holding a recorded ownership or other interest in the property that he was not named as a party in the section 22-20 publication notice and that the tax purchaser did not make a diligent inquiry and effort to serve that person or party with the notices required pursuant to sections 22-10 through 22-30. 35 ILCS 200/22-15 (West 1994).

The public guardian argued that the tax deed issued to Apex should be set aside because there was clear and convincing evidence that Apex had procured the tax deed by fraud or deception. *In re Application of the County Collector*, 217 Ill. 2d at 26. The public guardian claimed that Apex's representation that it had been unable to ascertain Lowe's whereabouts despite having conducted a diligent search constituted fraud or deception in light of "'Apex's willful ignorance with respect to the notations [from Hightower] on the undelivered envelopes.'" *In re Application of the County Collector*, 217 Ill. 2d at 23.

This court rejected the public guardian's argument, noting that in the context of tax deed proceedings, fraud is defined as a wrongful intent or an act calculated to deceive. *In re Application of the County Collector*, 217 Ill. 2d at 23. This court held that the record in the case did not show fraud. Specifically, this court found that:

"The envelopes with Jewel Hightower's notations on them were returned by the post office to their sender, the Cook County sheriff. The sheriff submitted the envelopes to the clerk of the circuit court, who then placed the envelopes in the court file, which, by statute, the clerk is required to maintain in tax deed cases. [Citation.] There was nothing unusual or unexpected about the fact that the envelopes were returned, undelivered. Both an agent from Apex and a deputy sheriff from the Cook County sheriff's office had visited the property, found it vacant, and had been told by neighbors that the occupants of the home had moved. Further, the notations on the envelopes addressed to Mary Lowe and 'occupant,''though legible, cannot reasonably be called prominent. The notations have a line drawn through them and they are partially obscured by the circuit court clerk's filing stamps and the post office's `returned to sender' stamps. More important, there is no evidence that Apex attempted to conceal the notations or alter the envelopes in any way. ***

On this record, the most that can be said with respect to Apex's actions is that Apex simply failed to discover the notations on the envelopes. However, as this court has frequently noted, the failure to uncover a particular fact during the search for a delinquent taxpayer does not, by itself, establish fraud." *In re Application of the County Collector*, 217 Ill. 2d at 23-24.

This court also rejected the public guardian's claim that the tax deed should be set aside because Lowe had been denied her due process right to adequate notice prior to the deprivation of her property. This court concluded that the public guardian was attempting to relitigate the circuit court's diligent-inquiry finding – a finding that could not be challenged in a section 2-1401 petition except on the grounds set forth in section 22-45 of the Code. *In re Application of*

the County Collector, 217 Ill. 2d at 37-38. Because this court had already concluded that fraud under section 22-45 had not been proven, this court declined to further consider the public guardian's argument that Apex failed to conduct a diligent inquiry to locate Lowe. *In re Application of the County Collector*, 217 Ill. 2d at 38.

Finally, this court rejected the public guardian's argument that the Code is unconstitutional as applied to all individuals like Lowe, who are hospitalized with a disabling mental illness during the section 22-10 notice period. *In re Application of the County Collector*, 217 Ill. 2d at 38. We held that the notice procedures set forth in sections 22-10 through 22-25 of the Code embodied all that could be done under existing law to locate and identify a delinquent taxpayer who is hospitalized for mental illness. *In re Application of the County Collector*, 217 Ill. 2d at 41-42.

The United States Supreme Court subsequently granted the public guardian's petition for writ of certiorari, vacated the judgment of this court, and remanded the cause for our further consideration in light of *Jones v. Flowers*, 547 U.S. ___, 164 L. Ed. 2d 415, 126 S. Ct. 1708 (2006). *Estate of Lowe v. Apex Tax Investments, Inc.*, 547 U.S. ___, 164 L. Ed 2d 811, 126 S. Ct. 2287 (2006).

ANALYSIS

We begin our analysis on reconsideration with a review of the *Jones* decision. At issue in *Jones* was whether the government must take additional reasonable steps to provide notice before taking an owner's property when the notice of tax sale that was mailed to the owner is returned undelivered. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713.

In that case, Gary Jones purchased a home on Bryan Street in Little Rock, Arkansas, in 1967 and lived in the Bryan Street home with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock and his wife remained in the Bryan Street home. Jones continued to pay the mortgage on the Bryan Street home after he moved out, and the mortgage company paid Jones' property taxes. After the mortgage was paid off in 1997, the property taxes went unpaid and the property was certified as delinquent. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 424, 126 S. Ct. at 1712.

In April 2000, the Commissioner of State Lands mailed a certified letter to Jones at the Bryan Street home notifying Jones of the tax delinquency and of his right to redeem the property. The letter also stated that unless Jones redeemed the property, the property would be subject to a public sale two years later on April 17, 2002. The post office returned the certified letter to the Commissioner marked "unclaimed" because no one was home to sign for the letter and no one retrieved the letter from the post office within the next 15 days. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 424, 126 S. Ct. at 1712.

Two years later, the Commissioner published a notice of public sale in the newspaper. No bids were submitted, so the State was permitted to negotiate a private sale of the property. Thereafter, Linda Flowers submitted a purchase offer. Accordingly, the Commissioner mailed another certified letter to Jones at the Bryan Street address notifying Jones that his house would be sold to Flowers if he did not pay his taxes. This letter was returned to the Commissioner marked "unclaimed." Flowers then purchased the house and, after the 30-day period for post sale redemption had passed, Flowers had an unlawful detainer notice delivered to the property. The unlawful-detainer notice was served on Jones'

daughter. Jones' daughter then told Jones about the tax sale. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 424, 126 S. Ct. at 1712-13.

Jones filed suit in state court against the Commissioner and Flowers alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of Jones' property without due process. The trial court granted summary judgment in favor of the Commissioner and Flowers, finding that the state tax sale statute that set forth the notice procedure complied with constitutional due process requirements. The Arkansas Supreme Court affirmed, finding that attempting to provide notice by certified mail satisfied due process under the circumstances. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 424-25, 126 S. Ct. at 1713.

Before the Supreme Court, the Commissioner argued that due process was satisfied once the state provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing Jones a certified letter. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1714. The Supreme Court agreed that it had deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 426, 126 S. Ct. at 1714. However, the Court stated that it had never addressed whether due process required further responsibility when the government becomes aware, prior to the taking, that its attempt at notice failed. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 426, 126 S. Ct. at 1714.

The Court explained that it did not "think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 427,

126 S. Ct. at 1716. Consequently, the State of Arkansas' decision to take no further action when the notice to Jones was returned unclaimed was "not what someone 'desirous of actually informing' Jones would do; such a person would take further reasonable steps if any were available." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 428, 126 S. Ct. at 1716. The Court held that upon receiving the returned form suggesting that Jones had not received notice that his property was about to be sold, the "State should have taken additional reasonable steps to notify Jones, if practicable to do so." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 430, 126 S. Ct. at 1718.

The Court explained that there were several reasonable steps the state could have taken when the certified letter to Jones was returned unclaimed. For example, the state could have resent the notice by regular mail so that a signature was not required. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 431, 126 S. Ct. at 1718-19. In addition, the state could have posted notice on the front door of the house or could have addressed the mail to "occupant," *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 431, 126 S. Ct. at 1719. Further, the Court found that the state's attempt to follow up with Jones by publishing notice in the newspaper was not constitutionally adequate under the circumstances of the case because it was possible and practicable to give Jones more adequate warning of the impending tax sale. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 433, 126 S. Ct. at 1720.

The Court rejected Jones' claim, however, that the Commissioner should have looked for his new address in the Little Rock phonebook and other government records, including income tax rolls. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 431-32, 126 S. Ct. at 1719. The Court stated that an "open-ended search for a new address - especially when the State obligates the taxpayer to keep his address updated with

the tax collector [citation] – imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Jones*, 547 U.S. at ___, 164 L. Ed, 2d at 432, 126 S. Ct. at 1719.

The Court declined to prescribe the form of service that the state should adopt, concluding that the state could determine how to proceed in response to the Court's conclusion that notice was inadequate under the facts of this particular case. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 433, 126 S. Ct. at 1721. Because notice in the case before it was insufficient to satisfy due process, the Supreme Court reversed the Arkansas state courts, holding that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713.

In reconsidering this case in light of Jones, we first note that this case is factually distinguishable from *Jones*. The notice provided pursuant to the Illinois Property Tax Code is far more comprehensive than the notice provided for in the Arkansas statute at issue in *Jones*. The Arkansas statute required the state to send only one notice, by certified mail, to a property owner notifying him of the government's intent to sell his property for delinquent taxes. In contrast, the Illinois statute provides that the county collector must provide notice to a delinquent taxpayer by certified or registered mail before obtaining a judgment order from the circuit court authorizing the sale of the property. 35 ILCS 200/21-110, 21-115, 21-135 (West 1994). In addition, after the court has ordered the sale of the property and the property has been sold to a tax purchaser, the county clerk must notify the delinquent taxpayer by certified or registered mail that the property has been sold and that the taxpayer may redeem

the property by paying the tax arrearage on or before a specified date. 35 ILCS 200/22-5 (West 1994). Finally, a tax purchaser seeking to obtain a tax deed also must send the delinquent taxpayer notice of the sale and the expiration of the redemption period.

Jones is further distinguishable because the issue in that case concerned the notice a state must provide to a property owner *before* taking his property. The *Jones* court characterized the issue before it as "whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when *notice of a tax sale* is returned undelivered," and held that "when mailed *notice of a tax sale* is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner *before selling his property*, if it is practicable to do so." (Emphases added.) *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713. In holding that the state must take additional reasonable steps to attempt to provide notice, the Supreme Court stated that it did "not think that a person who actually desired to inform a real property owner *of an impending tax sale* of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." (Emphasis added.) *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 427, 126 S. Ct. at 1716.

In this case, in contrast, there is no issue concerning notice of the tax sale. As we observed in our original opinion:

> "In the case at bar, it is undisputed that Mary Lowe was mentally incapacitated from January 1995 through October 1996. However, the tax sale in this case, and the time periods for the procedures noted above, occurred in 1993. The circuit court made no finding regarding the competency, or incompetency, of Mary Lowe in 1993. Moreover, while Dr. Rubin testified as to Lowe's

> incapacity in 1995 and 1996, he did not testify with respect to her condition in 1993. Thus, it appears that, *prior to the deprivation of her property*, and at a time when there is no finding of record that she was incompetent, Lowe was given notice of the application for judgment and order of tax sale, had an opportunity to object to the application for judgment, was given notice that the tax sale had occurred, and was given notice that she had the right to redeem her property," (Emphasis added.) *In re Application of the County Collector*, 217 Ill. 2d at 31.

Because there is no issue in this case concerning whether Lowe was given notice of the tax sale, we find that the due process concerns in *Jones* are not at issue in this case and, therefore, that *Jones* does not require this court to reverse its prior opinion.

The public guardian argues, however, that because the lack of notice in this case concerns the hearing at which Lowe actually lost the title to her home, Lowe was denied due process even if she may have received some earlier notice. The public guardian contends that the notice given to Lowe in this case was deficient because Apex failed to follow up on specific information that would have led to the discovery of Lowe's whereabouts and, even absent that specific information, Apex failed to make a diligent inquiry into finding Lowe.

The public guardian notes that in *Jones*, the certified mail notices were returned marked "unclaimed." In this case, not only were the section 22-10 certified mail notices to Lowe and "occupant" returned unclaimed, but the envelopes also contained a notation from the letter carrier that "Person is Hospitalized" along with the letter carrier's initials and postal route number. The public guardian argues that *Jones* directly

addressed this type of situation and held that due process requires a party to follow up on information provided in response to its chosen method of service.

The public guardian maintains that Hightower's notation on the envelopes in this case put Apex on notice that Lowe was not at the property where notice was sent, was not receiving mail at that address, and was hospitalized. In addition, the notation on the envelopes indicated that Apex could follow up with Hightower to find out where Lowe was hospitalized in order to provide Lowe with actual notice. Further, had Apex followed up with Hightower, Apex would have learned that Lowe was hospitalized in a state mental institution and that she was incompetent. The public guardian asserts that Apex had a constitutional duty under *Jones* to inspect the returned envelopes and take reasonable steps in response to any information that it discovered as a result.

Even if we were to accept the public guardian's argument that *Jones* applies in this case to the section 22-10 take notice, we nonetheless find our prior opinion to be consistent with *Jones*. The gravamen of the public guardian's argument is that, under *Jones*, Hightower's notations on the envelopes provided additional information to Apex that required Apex to take additional reasonable steps in an attempt to provide constitutionally sufficient notice to Lowe. We disagree.

As discussed, the Supreme Court in Jones observed that the state did nothing for two years after its notice to Jones was returned unclaimed. The Supreme Court held that the state could have taken additional reasonable steps to notify Jones that he was about to lose his property, such as resending the notice by regular mail, posting notice on the front door, or addressing the mail to "occupant."

In this case, Apex did take numerous additional steps to notify Lowe that her property had been sold and that a petition for tax deed had been filed. Apex conducted a tract search of the property to determine the owner of the property. The Cook County sheriff attempted to personally serve Lowe, Austin and "occupant," but determined that the home was vacant. The Cook County sheriff also sent the section 22-10 take notice by certified mail addressed to Lowe, Austin and "occupant." The clerk of the circuit court likewise attempted to serve Lowe, Austin and "occupant" with the section 22-10 take notice by certified mail, return receipt requested.

Apex also served the section 22-10 take notice on the law film that prepared the quit claim deed in 1993, and on the mortgagee of the property. Apex's agent, Berke, visited the property and spoke with a neighbor, who told Berke that the "Lowes" owned the property, but no one currently lived there. Moreover, Apex checked city and suburban phone directories and voter registration records in order to find another address for Lowe and Austin.

It is clear that the steps taken by Apex exceeded those suggested by the *Jones* Court as reasonable. In fact, the *Jones* Court stated that the state was not required to search for Jones' new address in the Little Rock phone book or in other government records, explaining that "[a]n open-ended search for a new address – especially when the State obligates the taxpayer to keep his address updated with the tax collector [citation] – imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 432, 126 S. Ct. at 1719.

In light of the foregoing, it is clear in this case that Apex's attempts at notice in this case were sufficient to

satisfy due process under *Jones*. We are not convinced that, under the circumstances of this case, Apex was required to take additional steps in response to Hightower's notations on the certified mail envelopes. We cannot consider the envelopes containing Hightower's notations in isolation, but instead must consider the envelopes in light of all the facts in this case.

Prior to receiving the envelope with the notation that "Person is Hospitalized," the Cook County sheriff filed returns of service indicating that the property was vacant and that Lowe had moved. This information was confirmed by Apex's agent based upon his own observation and his discussion with Lowe's neighbor. Apex also knew that Lowe had not responded to the county collector's initial notice of sale or the section 22-5 notice. Given the apparently accurate information suggesting that Lowe had moved, which conflicted with the notation that "Person is Hospitalized," we cannot say that Apex had a duty to further determine whether, in fact, Lowe was hospitalized, where Lowe was hospitalized, and why Lowe was hospitalized. We believe that such an open-ended search would impose a significantly greater burden than required under *Jones*.

Moreover, we are not as confident as the public guardian that any further inquiry would have revealed that Lowe was hospitalized at the Tinley Park Mental Health Center. As the appellate court found:

> "[T]he notation 'person is hospitalized' does not necessarily mean the individual is hospitalized in a mental health center. As the trial court indicated, individuals are hospitalized for numerous reasons. Hospitalization at a mental health center would not first come to mind when learning that a 'person is

hospitalized.'" No. 1-02-1101 (unpublished order under Supreme Court Rule 23).

In addition, as noted in our prior opinion, section 3(a) of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/3(a) (West 2000)) does not permit hospitals to disclose to tax purchasers the fact that an individual is a recipient of mental health services. *In re Application of the County Collector*, 217 Ill. 2d at 41. Likewise, Hightower did not explain what postal forms would have authorized disclosure that Lowe was hospitalized in the Tinley Park Mental Health Center.

Accordingly, we do not agree with the public guardian that, had Apex followed up on Hightower's notation, Apex would have discovered where Lowe was hospitalized and that Lowe was mentally incompetent. As the Supreme Court recognized, "[w]hat steps are reasonable in response to new information depends upon what the new information reveals," and if there are "no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 430-31, 126 S. Ct at 1718.

The public guardian next argues that, even absent the information provided by Hightower, Apex failed to undertake an inquiry expected of one seeking to inform Lowe of the proceedings against her. The public guardian asserts that Apex's agent, Berke, could have questioned Lowe's neighbor further concerning her whereabouts or could have questioned other neighbors for information on Lowe. Berke also could have posted information on the property, which likely would have elicited further information.

Again, given the information available to Berke, we do not agree that *Jones* would require Berke to conduct an open-

ended search into Lowe's whereabouts. The information available to Berke was that the property was vacant and that Lowe had moved. Further, Apex did check city and suburban phone directories and voter registration records in order to find another address for Lowe and Austin, but was unable to find an address other than the subject property address. Under the circumstances, we cannot say that Berke was required to conduct further investigation or that Lowe was constitutionally entitled to a more diligent inquiry.

Finally, we note that the public guardian argues that this court erred in its prior opinion in rejecting the public guardian's challenge to the adequacy of Apex's diligent inquiry, without addressing the merits of that argument, on the basis that a circuit court's diligent inquiry finding cannot be challenged in a section 2-1401 petition. The public guardian contends that its challenge to the adequacy of Apex's diligent inquiry is authorized by section 22-45(4) of the Code. The public guardian states that this court apparently read section 22-45(4) as allowing relief only when a party can show both that the tax purchaser failed to make a diligent inquiry and that the tax purchaser failed to comply with statutory publication requirements. The public guardian argues that section 22-45(4) should be read disjunctively to permit relief to a property owner who can show either a lack of diligent inquiry or a lack of adequate notice by publication.

We decline to address the public guardian's argument concerning section 22-45(4), as our reconsideration of this case is limited to the Supreme Court's decision in *Jones*. Consequently, our reconsideration of Apex's diligent inquiry in attempting to serve Lowe is limited to whether Apex's notice to Lowe satisfied due process under *Jones*.

After considering this case in light of the United States Supreme Court's decision in *Jones*, we find that this case does not present facts establishing that Lowe was denied her due process right under *Jones* to adequate notice prior to the deprivation of her property. For that reason, we adhere to our former disposition in this cause and affirm the judgment of the appellate court.

Appellate court judgment affirmed.

Justices KARMEIER and BURKE took no part in the consideration or decision of this case.

Justice KILBRIDE, dissenting:

I respectfully dissent from the majority opinion because I disagree with its interpretation and application of the Supreme Court's opinion in *Jones v. Flowers*, 547 U.S. 220, 164 L. Ed. 2d 415, 126 S. Ct. 1708 (2006). *Jones* stands for the proposition that a party with the duty to provide notice to a property owner must "take additional reasonable steps to attempt to provide notice" when "it is practicable to do so." Jones, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713. In explaining the types of steps necessary to fulfill this requirement, the Court reiterated the long-established standard cited in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Under that standard, to comport with due process, notice "'must be such as *one desirous of actually informing the absentee might reasonably adopt* to accomplish it.'" (Emphasis added.) *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 427, 126 S. Ct. at 1715, quoting *Mullane*, 339 U.S. at 315, 94 L. Ed. at 874, 70 S. Ct. at 657. I do not believe that standard was met in this case.

As the majority correctly notes (slip op. at 13-14), the facts in *Jones* differ from those in this appeal. Those differences, however, only serve to underscore the need for heightened due process protections for property owners like Lowe, who face imminent danger of forfeiting all interest in their homes without an opportunity to object. In *Jones*, the Court addressed the sufficiency of Arkansas' notice requirements *prior to* a tax sale. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713. Slip op. at 13-14. Here, the issue involves this state's section 22-10 notice requirements *after* a tax sale has occurred but *before* the owner is actually stripped of title to the property. Slip op. at 14. Without the section 22-10 notice, Lowe was at risk of irretrievably losing *all* interest in her home without being given an opportunity to make a timely objection or redeem the property.

Furthermore, the property owner in *Jones* was mentally competent and simply neglected to ensure that the taxes on the property were paid and that the mailing address in the tax records was updated. Lowe, on the other hand, has a long history of serious mental health problems and was undeniably incompetent when the section 22-10 notices were given. Moreover, her permanent mailing address in the tax records was correct because she continued to reside at the property except when she was hospitalized for mental-health treatment.

Illinois' section 22-10 "Take Notice" is designed to inform the owner that property has already been sold at a tax sale and that title will transfer to the tax purchaser if the property is not redeemed by paying the back taxes before the expiration of the redemption period. 35 ILCS 200/22-10 (West 1994). Thus, this notice provides the *final opportunity* for the property owner to preserve *any interest* in the property. Due to the magnitude and imminence of the risk of

complete forfeiture, I believe that due process mandates even more stringent notice requirements than those required *before* the sale of the property. A heightened notice standard is justified when the parties' interests are balanced, with the imminent, irreversible loss of title to a home or other property carrying substantial weight. See *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657 (explaining that the specific test for the sufficiency of notice depends on the balance between the interest of the individual being protected by the due process clause and the state's interest). See also *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 427, 126 S. Ct. at 1715 (quoting *Mullane*). Indeed, our legislature has deemed it appropriate to enact more stringent statutory notice requirements in the post sale context than in the presale context. Compare 35 ILCS 200/21-110, 21-115, 21-135 (West 1994) with 35 ILCS 200/22-5, 22-10, 22-15, 22-20, 22-25 (West 1994).

There is, however, one significant factual similarity between this case and *Jones*. In both instances, after it became apparent that the property owner had not received the statutory notice, the party obliged to provide notice "did – nothing." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 430, 126 S. Ct. at 1718. The Court in *Jones* concluded that due process necessitated "additional reasonable steps to notify [the property owner], if practicable to do so." *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 430, 126 S. Ct. at 1718.

More specifically, the *Jones* Court repeatedly noted the principle that due process mandates notice "'such as *one desirous of actually informing the absentee might reasonably adopt* to accomplish it.'" (Emphasis added.) *Jones*, 547 U.S. at __, __, __, 164 L. Ed. 2d at 427, 428, 433, 435, 126 S. Ct. at 1715, 1716, 1721, 1722, quoting *Mullane*, 339 U.S. at 315, 94 L. Ed. at 874, 70 S. Ct. at 657. Here, it is difficult to imagine that someone "desirous of actually informing" Lowe

of the impending loss of her property would find it unreasonable or "impracticable" to call the post office to inquire about the letter carrier's notation on the returned certified mail envelope addressed to Lowe stating that she was "hospitalized." While this standard conflicts with the inherently adverse interests of tax purchasers, who rationally wish to obtain their tax deeds with the least possible effort and expense, constitutional due process standards do not exist for the benefit of the party intent on taking possession of another's property. See *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657. See also *Jones*, 547 U.S. at ___, 164 L. Ed 2d at 433-34, 126 S. Ct. at 1721 (noting that the state has far less incentive to provide proper notice to property owners before taking actions adverse to them than it has to secure the revenue obtained from the taking). Fundamental due process safeguards are designed to provide property owners with the right to be heard. Due process entails the right to present objections and not be unwittingly stripped of property. This right has little meaning if the owner is not informed of the pending action and given the opportunity to object. See *Greene v. Lindsey*, 456 U.S. 444, 449-50, 72 L. Ed. 2d 249, 254-55, 102 S. Ct. 1874, 1877-78 (1982).

Moreover, while due process does not demand actual notice to the property owner (*Dusenbery v. United States*, 534 U.S. 161, 170, 151 L. Ed. 2d 597, 606, 122 S, Ct 694, 701 (2002)), the notice provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (emphasis added) (*Mullane*, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657). Here, the circumstances required Apex to follow up on the letter carrier's notation that Lowe was hospitalized. Only by following up on that information would the notice provided

be "reasonably calculated" to afford Lowe notice "under all the circumstances" known to Apex at the time. The arguably conflicting information suggesting that Lowe had moved (see slip op. at 17) did not negate the relevance of the additional information on the envelope to Apex's duty to provide notice sufficient to satisfy due process. The duty to provide due process required the notice given to be "reasonably calculated, under all the circumstances, to apprise" Lowe of the action. (Emphasis added.) *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657. See slip op. at 16-17.

Similarly, ignoring information stating that the property owner is hospitalized does not comply with Apex's statutory duty under section 22-15 (35 ILCS 200/22-15 (West 1994)). Section 22-15 mandates that a tax purchaser exercise "diligent inquiry and effort" in finding the property owner and serving a section 22-10 notice. 35 ILCS 200/22-15 (West 1994). The plain and ordinary meaning of "diligent" is "characterized by steady, earnest, attentive, and energetic application and effort in a pursuit." Webster's Third New International Dictionary 633 (1993). Under this definition, Apex's failure to do *anything* after being informed that Lowe was hospitalized cannot reasonably be regarded as even "diligent inquiry and effort" to locate and serve Lowe.

Nor does the mere possibility that Apex's inquiries at the post office may have been unsuccessful in obtaining information about Lowe's location or mental-health status fulfill its due process duty to at least *attempt* to provide notice based on *all* available information. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713-14 (citing *Dusenbery*, 534 U.S. at 170, 151 L. Ed. 2d at 606, 122 S. Ct. at 701, and *Mullane*, 339 T.J.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657). See slip op. at 17. Surely due process does not allow the selective acknowledgment of information minimizing the tax purchaser's duty of notification and the

complete disregard of other available information requiring the "additional reasonable step" of simply inquiring about the notation at the post office. *See Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713. Due process is intended, after all, to provide property owners with a reasonable opportunity to protect their interests. See *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657. The goal of due process is not to minimize the notification burden placed on a tax purchaser.

Finally, requiring Apex to inquire about the letter carrier's notation at the post office does not constitute the type of "open-ended search" rejected by the *Jones* Court. Jones, 547 U.S. at ___, 164 L. Ed. 2d at 432, 126 S. Ct. at 1719. Apex would initially be required to take the limited step of contacting the post office to inquire about the notation on the returned certified mail envelope indicating that Lowe was hospitalized. Apex may or may not be required to take other reasonable and practicable steps to follow up on any subsequent findings. Jones, 547 U.S. at ___, 164 L. Ed. 2d at 426, 126 S. Ct. at 1714 (quoting its explanation in *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 1 L. Ed. 2d 178, 182, 77 S. Ct. 200, 202 (1956), that "the 'notice required will vary with circumstances and conditions'"). Regardless of the outcome of its inquiry, however, Apex would not be obliged to scour local hospitals in an open-ended search for Lowe.

Thus, because "[u]nder the circumstances presented here, additional reasonable steps were available" to Apex, I believe it failed to satisfy its due process obligations. *Jones*, 547 U.S. at ___, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713. I would reverse the appellate court judgment and remand for further proceedings. Therefore, I respectfully dissent from the majority opinion.

Appendix B

Supreme Court of the United States

No. 05-912

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS, COOK COUNTY PUBLIC GUARDIAN and SUPERVISED ADMINISTRATOR,

Petitioner

v.

APEX TAX INVESTMENTS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Illinois.

THIS CAUSE having been submitted on the petition for a writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjuged by this Court that the petition for writ of certiorari is granted, and the judgment of the above court in this cause is vacated with costs, and the case is remanded to the Supreme Court of Illinois for further consideration in light of *Jones* v. *Flowers*, 547 U.S. ___ (2006).

IT IS FURTHER ORDERED that the petitioner Estate of Mary Lowe by Robert F. Harris, Cook County Public Guardian and Supervised Administrator recover from Apex Tax Investments, Inc., et al., Three Hundred Dollars ($300.00) for costs herein expended.

May 22, 2006

Appendix C

Supreme Court of Illinois.

In re APPLICATION OF the COUNTY COLLECTOR for Judgment and Sale Against Lands and Lots Returned Delinquent for Nonpayment of General Taxes and/or Special Assessments for the Years 1991 and Prior Years (Apex Tax Investments, Inc., et al., Appellees, v. Mary Lowe, Deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Appellant).

No. 97165.

Oct. 20, 2005.

Justice McMORROW delivered the opinion of the court:

Apex Tax Investments, Inc. (Apex), purchased the home of Mary Lowe at a tax sale and was issued a tax deed for the property by order of the circuit court of Cook County. Subsequently, the Cook County public guardian, on behalf of the estate of Mary Lowe, filed an amended petition pursuant to section 2- 1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) and section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)) seeking to have the tax deed set aside. In the amended petition, the public guardian alleged that at the time Apex attempted to provide Lowe with the notice required by section 22-10 of the Property Tax Code (35 ILCS 200/22- 10 (West 1994)), Lowe was hospitalized for schizophrenia. The public guardian further alleged that Apex should have known of Lowe's mental impairment based on notations made by a mail carrier on the envelopes of two letters that were mailed to Lowe but returned, undelivered. Based on these allegations, the public

guardian contended that Apex had not complied with the statutory notice requirements of the Property Tax Code and that Lowe's "due process right to adequate notice" had been violated.

Following a hearing, the circuit court denied the public guardian's petition. The appellate court affirmed. No. 1-02-1101 (unpublished order under Supreme Court Rule 23). For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

The procedures governing tax sales and the issuance of tax deeds are set forth in article 21, division 4, and article 22 of the Property Tax Code. 35 ILCS 200/21-190 *et seq.*, 22-5 *et seq.* (West 1994). Pursuant to section 21-190, the county collector may offer property for public sale when judgment has been rendered against that property for nonpayment of real estate taxes. The buyer of property at such a sale does not receive title to the property but, instead, receives a "certificate of purchase." 35 ILCS 200/21-250 (West 1994). The issuance of a certificate of purchase does not affect the delinquent property owner's legal or equitable title to the property. *Phoenix Bond & Indemnity Co. v. Pappas*, 194 Ill.2d 99, 101, 251 Ill.Dec. 654, 741 N.E.2d 248 (2000). The property owner has the right to redeem the property, upon the payment of the tax arrearage and costs, until such time as the redemption period expires. 35 ILCS 200/21-345 through 21-355 (West 1996); Ill. Const.1970, art. IX, § 8.

"[W]ithin 5 months but not less than 3 months prior to the expiration of the redemption period," the tax purchaser may file a petition in the circuit court asking the court to enter an order directing the county clerk to issue a tax deed to the property. 35 ILCS 200/22-30 (West 1994). Before the tax purchaser may receive such an order, however, the

redemption period must expire without any redemption taking place. In addition, as a condition to receiving a tax deed order, the tax purchaser must prove to the circuit court that it has strictly complied with the statutory notice provisions set forth in sections 22-10 through 22-25 of the Property Tax Code (35 ILCS 200/22-10 through 22-25 (West 1994)). See 35 ILCS 200/22-40 (West 1994).

In the case at bar, Apex purchased a parcel of residential real estate at the annual Cook County tax sale held on March 3, 1993. The property was improved with a single-family, split-level townhouse. On October 5, 1995, Apex filed a petition for a tax deed to the property in the circuit court of Cook County. Attached to the petition was Apex's certificate of purchase, which indicated that the property had been purchased for $347.61, the amount of a 1991 tax delinquency. The petition also stated that the redemption period expired by extension on February 21, 1996. See 35 ILCS 200/21-385 (West 1994). No redemption occurred by that date, and Apex's petition proceeded to an *ex parte* hearing before Judge Marjan Staniec on March 18, 1996. See 35 ILCS 200/22-40 (West 1994).

At the hearing, Apex's attorney informed the court about the efforts that had been made to comply with the statutory notice provisions of the Property Tax Code. Apex's attorney told the court that, from a tract search, Apex had learned that the property at issue was owned by two individuals, Mary Lowe and William Austin, and that this information was conveyed to the Cook County sheriff and the clerk of the circuit court of Cook County. On October 26, 1995, in accordance with section 22-15 of the Property Tax Code (35 ILCS 200/22-15 (West 1994)), the Cook County sheriff attempted to personally serve Lowe, Austin and "occupant" with the "take notice" set forth in section 22-10. The section 22-10 take notice must be given "not less than 3 months nor

more than 5 months prior to the expiration of the period of redemption." 35 ILCS 200/22- 10 (West 1994). The notice must state, *inter alia*, that the property at issue has been sold for delinquent taxes, that the period of redemption expires on the date listed, that a petition for a tax deed has been filed, and that a hearing on the tax deed petition will be held at the time and place listed. See 35 ILCS 200/22-10 (West 1994).

As required by statute (see 35 ILCS 200/22-20 (West 1994)), the Cook County sheriff filed the returns of service for the section 22-10 take notices with the clerk of the circuit court. The returns of service were filed with the clerk on November 9, 1995, and were admitted into evidence during the hearing on Apex's petition. On each of the returns of service, the deputy sheriff who attempted to serve the notice wrote "House vacant per neighbors." The deputy sheriff also placed a mark next to the word "MOVED" on the preprinted form to indicate the reason why notice was not served.

Having failed to effect personal service on Austin, Lowe or "occupant," the sheriff also sent take notices to them at the property's address by certified mail, return receipt requested. See 35 ILCS 200/22-15 (West 1994). These three notices were returned to the sheriff, undelivered, and were subsequently filed with the clerk of the circuit court. At the hearing on Apex's petition, the envelopes for the three notices were admitted into evidence. The record on appeal contains the original, unopened envelope addressed to Austin, and photocopies of the envelopes addressed to Lowe and "occupant."

All three envelopes are postmarked November 8, 1995, and are stamped "returned to sender." On the envelope addressed to Austin, the word "deceased" is handwritten in pencil on the left side of the envelope. The sheriff filed this envelope with the clerk of the circuit court on November 22, 1995. The envelopes addressed to Lowe and "occupant" bear

a stamp which indicates that attempts were made to deliver the notices on November 16, December 11, and December 18, 1995. In addition, on the left side of these two envelopes, written vertically, is a handwritten notation which reads: "Person is Hospitalized." Underneath these notations on both envelopes, also handwritten, is a number, "2719," and the letters "JHT." The notations on both of the envelopes have a line drawn through them and are obscured, in part, by the circuit court clerk's filing stamp and the post office's "returned to sender" stamps. The sheriff filed the envelopes addressed to Lowe and "occupant" with the clerk of the circuit court on January 2, 1996. Neither Apex's attorney nor the circuit court mentioned the notations on the envelopes at any time during the hearing on Apex's tax deed petition.

In accordance with section 22-25 of the Property Tax Code (35 ILCS 200/22-25 (West 1994)), the clerk of the circuit court of Cook County also sent take notices by certified mail addressed to Lowe, Austin and "occupant." Like the notices sent by the sheriff, these notices were returned, undelivered. The notices were filed in the court record (see 35 ILCS 200/22-25 (West 1994)) and were admitted into evidence at the hearing. The envelopes for the notices sent to Austin and "occupant," as well as a photocopy of the envelope sent to Lowe, are part of the record on appeal. All three envelopes are postmarked November 8, 1995, and are stamped "returned to sender." Notations on the envelopes indicate that attempts were made to deliver the notices on November 9, November 15, and November 24, 1995. The clerk of the circuit court filed the notices addressed to Lowe and "occupant" in the court record on November 29, 1995, and the notice addressed to Austin on November 30, 1995.

Pursuant to sections 22-15 and 22-20 of the Property Tax Code (35 ILCS 200/22-15, 22-20 (West 1994)), Apex also

provided publication notice to Lowe and Austin. The same notices that were sent by mail to the property were published in the Chicago Daily Law Bulletin on October 11, October 12, and October 13, 1995.

During the hearing on Apex's petition, Apex's attorney informed the court that Mary Lowe had conveyed her home through a quitclaim deed to herself and Austin, as joint tenants, in 1993. Apex's attorney explained to the court that, "attempting to be diligent in ascertaining the whereabouts" of Lowe and Austin, the Cook County sheriff had personally served the law firm which prepared the 1993 quitclaim deed with a section 22-10 take notice. In addition, the clerk of the circuit court sent notice to the firm by certified mail on November 8, 1995. The First National Bank of Chicago, in its capacity as a mortgagee of the property, was also personally served with a take notice on October 24, 1995. And, the clerk of the circuit court sent notice by certified mail to the bank on November 8, 1995.

Apex's agent, Fred Berke, also testified at the hearing regarding the efforts Apex made to locate Lowe and Austin. Berke stated that he had visited the property at issue and inspected it on Apex's behalf. Berke testified that after arriving at the townhouse, he knocked on the door and looked in the living room window. He saw no furniture inside the home. He also spoke to a next-door neighbor who told him that the owner of the property was "the Lowes" but that no one was currently living there. Berke told the court that the home appeared to be uninhabited.

Finally, Apex's attorney stated to the court that, after taking the preceding actions, and after checking city and suburban phone directories and voter registration records, Apex was "unable to develop any address for William Austin or Mary Lowe other than the subject property address."

According to Apex's attorney, "all regular efforts" to locate Lowe and Austin had "proved fruitless."

At the close of the hearing, the circuit court found that the redemption period had expired and that no redemption had been made. The court further found that Apex had complied with the notice provisions of the Property Tax Code. The court found, in particular, that Apex had exercised "due diligence" in attempting to locate Lowe and Austin, thereby satisfying the requirement set forth in section 22-15 that the tax purchaser make a "diligent inquiry" to find the property owner and interested parties. 35 ILCS 200/22-15 (West 1994). The circuit court continued the matter to allow Apex to provide a transcript of the proceedings and to submit proof of its payment of taxes for the years subsequent to 1991. See 35 ILCS 200/22-40 (West 1994). Thereafter, on May 20, 1996, the circuit court entered a written order which stated that, "upon proofs and exhibits heard and offered in open court," the court had found that Apex "fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto." The order directed the county clerk to issue Apex a tax deed to the property, and the deed was issued that same day.

Approximately seven months later, on December 6, 1996, Apex entered into an installment contract to sell the property to a third-party, John Herndon. Under the terms of this contract, Herndon was to pay a total of $10,000 for the property, with $3,000 in earnest money to be applied to the purchase price, and a $2,000 payment due on December 9, 1996. The final installment payment was due March 31, 1999. In deposition testimony taken on March 10, 1999, Herndon stated that he had made a $3,000 and a $2,000 payment to Apex, but that he had not, as of that date, paid anything further on the contract. He also stated that he had

not closed on the home, and that he had not received a deed for the property.

Herndon further stated in his deposition testimony that the property was in substantial disrepair when he purchased it. According to Herndon, there was garbage and water throughout the house, windows were broken, and the front door was "wide open." Herndon described the home as "an abandoned building." Herndon stated that, after entering into the installment contract with Apex, he invested over $20,000 in material and labor into renovating the property. Although it is not clear from the record precisely when these renovations began, it appears that they were completed by early 1998.

Approximately nine months after Apex entered into the contract with Herndon, on September 5, 1997, two of Mary Lowe's sons, Bruce and Mario Lowe, filed a *pro se* petition for "Restoration of Property Ownership" in the circuit court of Cook County. In this petition, Bruce Lowe stated that his mother had "been in and out of various mental facilities for the past 30 years of her life," and that she had been hospitalized in a mental health facility from August 26, 1995, to December 17, 1996. Bruce further stated that his mother had been released to his custody and that she was currently residing with him in California. Bruce also contended in the petition that personal service on an incompetent individual violates the individual's right to due process and asked the court to "reinstate full rights of ownership to Mary Lowe."

Based on Bruce Lowe's allegation that his mother was mentally disabled, the circuit court appointed the Cook County public guardian to represent Mary Lowe in early November 1997. On November 10, 1997, the public guardian filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) and section 22-45 of the Property Tax Code (35 ILCS 200/22-45

(West 1994)), seeking to have the tax deed that had been issued to Apex set aside. An amended petition was filed on April 17, 1998.

In the amended petition, the public guardian alleged that Mary Lowe suffered from schizophrenia and that she had been hospitalized in the Tinley Park Mental Health Center at the time the section 22-10 take notices were sent to her property in November 1995. The petition also noted that two of the notices mailed by the Cook County sheriff had been returned with the notations "Person is hospitalized 2719 JHT" written on the envelopes. The petition alleged that these notations were written by a mail carrier, Jewel Hightower, and that the number "2719" was her postal route number and the letters "JHT" were her initials. The petition further alleged that Apex never attempted to contact Hightower or the post office. Therefore, according to the public guardian, Apex "failed to make a diligent inquiry" as to the whereabouts of Mary Lowe and failed to satisfy the notice requirements of the Property Tax Code.

The public guardian's petition also asserted that Mary Lowe had been denied her "due process right to adequate notice" prior to the deprivation of her real property. In support of this contention, the public guardian cited to *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), wherein the Supreme Court held that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the requirements of due process]." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. 1026. In addition, the petition asserted that Lowe's due process rights were violated because, given Lowe's mental disability, even if she had received the notices mailed by Apex to her home, those notices would have been meaningless to her.

On August 12, 1998, John Herndon filed a motion to dismiss the public guardian's amended petition. In this petition, Herndon contended that, by virtue of his December 6, 1996, contract with Apex, he was a *bona fide* purchaser of the property at issue. In a subsequent filing, Herndon further contended that, after he paid $5,000 to Apex under the installment contract, and spent over $20,000 in improvements on the property, an equitable conversion occurred (see *Shay v. Penrose*, 25 Ill.2d 447, 185 N.E.2d 218 (1962)), and he became a *bona fide* purchaser of the property on this basis as well. Citing to subsection (e) of section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(e) (West 1994)) Herndon argued that a *bona fide* purchaser's interest in property cannot be affected by the filing of a section 2-1401 petition and, therefore, that the public guardian's amended petition should be dismissed.

In written order entered on June 8, 1999, the circuit court rejected Herndon's arguments. Relying on *Daniels v. Anderson*, 162 Ill.2d 47, 60-61, 204 Ill.Dec. 666, 642 N.E.2d 128 (1994), the court determined that Herndon's contract with Apex did not render Herndon a *bona fide* purchaser because Herndon had knowledge of Mary Lowe's interest in the property in August 1998, several months before he would have acquired title to the property under the terms of the contract. The circuit court also rejected Herndon's equitable conversion theory. The court reasoned that Apex knew or should have known that Lowe was hospitalized, based on the notations written by Jewel Hightower on the returned envelopes. The circuit court concluded, without further elaboration, that Apex's actual or constructive knowledge of Lowe's hospitalization should be imputed to Herndon and, therefore, that the "equitable conversion theory [was] not applicable and that Herndon at his own risk undertook to purchase and to rehab the property."

On August 18, 2000, the public guardian filed a motion to stay proceedings. In this motion, the public guardian stated that it had recently learned that Mary Lowe died on November 15, 1998, and that since that time, Bruce Lowe had "fraudulently misrepresented to the Public Guardian" that she was alive[2]. The public guardian sought to stay the proceedings, "pending the appointment of an appropriate representative, for the estate of May Lowe, to pursue the Petition to Set Aside the Tax Deed." On September 6, 2000, the circuit court entered an order dismissing the amended petition to set aside the tax deed.

Thereafter, the probate division of the circuit court of Cook County entered an order appointing the public guardian as administrator to collect for the estate of Mary Lowe. The public guardian then filed a motion to vacate the circuit court's order of September 6, 2000, and to substitute the public guardian as the proper party to prosecute the amended petition to set aside the tax deed. In a written filing, Apex contested this motion. Apex disputed whether the public guardian had, in fact, ever been appointed to represent Mary Lowe, and further contended that any such representation of Mary Lowe should not have been permitted under the relevant statutory authority. In response, the public guardian submitted a written filing that included an affidavit from Judge Staniec, who had retired from the bench in July 1999. In this affidavit, Judge Staniec confirmed that he had appointed the public guardian to represent Lowe in November of 1997. Judge Staniec also stated that, if he had

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[2] In a letter to the public guardian, Bruce Lowe apologized for not disclosing his mother's death. Bruce stated that he did not inform the public guardian of Mary Lowe's death because he was concerned that "disclosure would further delay this matter" and that he would "lose the support of the Public Guardian's Office."

"been advised that Mary Lowe was hospitalized during the applicable notice serving periods," he would not have issued a tax deed order to Apex. On June 27, 2001, the circuit court vacated the order of September 6, 2000, and entered an order substituting the public guardian, now serving as administrator to collect for the estate of Mary Lowe, as the proper party to prosecute the amended petition.

The public guardian's amended petition to set aside the tax deed proceeded to an evidentiary hearing on February 20, 2002. At the outset, the circuit court explained that, although it had been determined that Herndon was not entitled to the legal status of *bona fide* purchaser, he would be allowed to participate in the hearing because he had purchased the property at issue.

The public guardian was the only litigant to present testimony at the hearing. Dr. Bernard Rubin, an expert in the field of psychiatry, was the public guardian's first witness. Rubin testified that he reviewed Mary Lowe's mental-health records from 1964 through 1996 and spoke to Mary Lowe's son, Bruce Lowe, by telephone on four occasions. Rubin never spoke to, or saw, Mary Lowe.

From his review of her mental-health records, Rubin concluded that Mary Lowe suffered from disorganized, chronic schizophrenic disorder, the most severe from of schizophrenia. Rubin stated that Lowe suffered from intermittent bouts of schizophrenia from the early 1960s until 1995. In January 1995, following the death of her companion, William Austin, Lowe was hospitalized briefly in the Tinley Park Mental Health Center. She was admitted to that hospital in August 1995 and remained there until her discharge in December 1996. Rubin stated that, from January 1995 until October 1996, Lowe suffered from a mental illness, was generally incompetent, and had no capacity to care for her personal needs or to fulfill social or business

responsibilities. According to Rubin, Lowe would not have been able to understand, or respond to, legal documents served upon her between January 1995 and October 1996. Rubin stated that psychotropic medication began to improve Lowe's condition in October 1996 and that she was subsequently released to the custody of her son.

The public guardian also offered testimony from Jewel Hightower. Hightower testified that she worked for the United States Postal Service as a mail carrier and that the property at issue in this case was on her delivery route. Hightower stated that she wrote "person is hospitalized" on the letters sent by the sheriff to Mary Lowe and "occupant" and returned the letters to their sender. Hightower further stated that the number "2719," which appeared under the words "person is hospitalized," was her postal route number and that the letters "JHT" were her initials. Hightower stated that, although she knew Lowe was in the Tinley Park Mental Health Center at the time the take notices from the sheriff were sent to Lowe, she did not provide this information on the envelopes. According to Hightower, postal regulations allowed her to note that an addressee was hospitalized but did not allow her to note anything more specific. Hightower also explained that someone wanting to learn of Lowe's exact whereabouts could have done so if they had come to the post office and filled out the "proper forms."[3] Hightower stated that neither she, nor anyone at the post office, was contacted about the notations on the envelopes.

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[3] Hightower did not further identify the statue or regulation which would authorize the postal service to disclose Mary Lowe's hospitalization in a mental-health facility.

On April 9, 2002, the circuit court denied the public guardian's amended petition to set aside the tax deed. In a ruling issued from the bench, the circuit court noted that the amended petition was brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) as limited by section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). The court further noted that under subsection (3) of section 22-45 of the Property Tax Code, a tax deed may be set aside when there is "proof by clear and convincing evidence" that the tax deed order was "procured by fraud or deception." 35 ILCS 200/22-45(3) (West 1994). The circuit court reviewed the evidence of record and concluded that Apex had not procured its tax deed order through fraud or deception.

With respect to the public guardian's constitutional arguments, the circuit court stated that the notice provisions of the Property Tax Code, "as applied, can result in a due process violation where a person with an interest in the property is mentally incompetent and the tax deed petitioner either knew or reasonably should have known [of] that disability." The circuit court found that Dr. Rubin's opinion that Mary Lowe was incompetent was correct and noted that "given Ms. Lowe's capacity, even if she had received that notice, she wouldn't have been able, in all likelihood, to understand or act upon it." However, the circuit court also noted that an individual may be hospitalized for many reasons that have nothing to do with mental illness. From this, the court determined that, even if the notations made by Jewel Hightower alerted Apex to the fact that Lowe was hospitalized, that did not mean that Apex knew, or should have known, that Lowe was mentally impaired. Because Apex had no knowledge of Lowe's impairment, the court concluded there was no due process violation.

The appellate court, adopting much of the circuit court's reasoning, affirmed. No. 1-02-1101 (unpublished order under Supreme Court Rule 23). We granted the public guardian's petition for leave to appeal. 177 Ill.2d R. 315(a). We also granted leave to the Mental Health Association in Illinois and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic to file an *amicus curiae* brief in support of the estate of Mary Lowe.

ANALYSIS

The public guardian advances both statutory and constitutional grounds for relief. We first consider the public guardian's statutory arguments.

Statutory Relief

The public guardian's petition to set aside the tax deed issued to Apex is a collateral attack upon the circuit court's tax deed order, brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)). Collateral attacks upon tax deed orders implicate two competing public policies. On the one hand, "[t]he forced sale of a home is a grave and melancholy event" (*Smith v. D.R.G., Inc.*, 63 Ill.2d 31, 39, 344 N.E.2d 468 (1976)) that can have severe consequences for the delinquent taxpayer Allowing a collateral attack upon the tax deed order provides the delinquent taxpayer with an opportunity, in addition to the direct appeal, to ensure that the order was properly obtained. On the other hand, the availability of a collateral challenge to the tax deed order tends to undermine the finality and, hence, the marketability of the tax deed. This point is significant because tax purchasers participate in the tax sale system in order to obtain marketable titles. See *Village of Dolton v. First National Bank of Blue Island*, 12 Ill.2d 435, 440, 147 N.E.2d 62 (1957) ("Our whole system of judicial sales is based upon the public's willingness to accept titles thereby

created"). If tax purchasers do not participate in tax sales, then delinquent taxpayers lose the incentive to pay their real estate taxes and tax revenues fall. See *Cherin v. The R. & C. Co.*, 11 Ill.2d 447, 451-53, 143 N.E.2d 235 (1957); G. Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 51 Chi.-Kent L.Rev. 725, 725-26 (1975); D. Karlen & R. Slutzky, *A Guide to Tax Deed and Indemnity Fund Proceedings*, in Real Estate Taxation § 11.37, at 11-75 (Ill. Inst. for Cont. Legal Educ.2005) ("Participation by tax purchasers is essential to the tax collection process because tax purchasers represent a threat to property owners that will induce them to make timely payments").

Over the past several decades, the balance between the competing policies of ensuring the propriety of tax deed orders by permitting collateral challenges to such orders, and preserving the marketability of tax deeds, has been struck in different ways. In 1951, the legislature substantially revised the Revenue Act of 1939 (Ill.Rev.Stat.1951, ch. 120, par. 482 *et seq.*), the predecessor statute to the Property Tax Code. As this court has frequently noted, these revisions were undertaken, in large part, to improve the marketability and validity of tax titles in order to reduce real estate tax delinquencies. See, e.g., *In re Application of the County Treasurer*, 92 Ill.2d 400, 406, 65 Ill.Dec. 905, 442 N.E.2d 216 (1982) (observing that, before 1951, tax deeds "amounted to little more than a cloud on the title of the delinquent owner"); L. Dotson, Note, 40 *Chi.-Kent L.Rev.* 155, 157-58 (1963). Prior to the 1951 revisions, the decision as to whether the statutory requirements for obtaining a tax deed had been met, including whether notice requirements had been satisfied, was made administratively, by the county clerk. The 1951 revisions altered this practice and made the issuance of the tax deed a judicial decision, made by the county court upon petition. Ill.Rev.Stat.1951, ch. 120, par. 747; *In re Application of the County Treasurer*, 214 Ill.2d

253, 262, 291 Ill.Dec. 758, 824 N.E.2d 614 (2005); *Cherin*, 11 Ill.2d at 451-53, 143 N.E.2d 235. Section 266 of the Revenue Act was also amended to provide that the tax deed order would be "incontestable" except by direct appeal. Ill.Rev.Stat.1951, ch. 120, par. 747; *Cherin*, 11 Ill.2d at 453, 143 N.E.2d 235. No provision in the Revenue Act allowed for collateral challenges to the tax deed order. Further, section 266 was amended to state that it was to "be liberally construed so that tax deeds herein provided for shall convey merchantable title." Ill.Rev.Stat.1951, ch. 120, par. 747.

Seven years after the 1951 revisions to the Revenue Act, in *Southmoor Bank & Trust Co. v. Willis*, 15 Ill.2d 388. 155 N.E.2d 308 (1958), this court addressed the "delicate problem" of construing section 266 of the Revenue Act, which, as noted, did not permit collateral attacks upon tax deed orders, with section 72 of the Civil Practice Act (Ill.Rev.Stat.1957, ch. 110, par. 72), the statutory predecessor to section 2-1401. *Southmoor Bank*, 15 Ill.2d at 394, 155 N.E.2d 308. Examining the two statutes, this court observed that section 72 established a uniform procedure "for obtaining relief from all final orders, judgments and decrees within its purview." *Southmoor Bank*, 15 Ill.2d at 394-95, 155 N.E.2d 308. Reasoning that section 72 and section 266 of the Revenue Act were in pari materia. we concluded "that the legislature desired to render tax titles incontestable except by direct appeal, subject to the provisions of section 72 of the Civil Practice Act." *Southmoor Bank*, 15 Ill.2d at 394, 155 N.E.2d 308. The court further noted, however, that unless a lack of jurisdiction affirmatively appeared on the record, "the prior finding of the county court of compliance with all the provisions of law entitling petitioner to a tax deed could not * * * be disputed in [the section 72] proceeding." *Southmoor Bank*, 15 Ill.2d at 396, 155 N.E.2d 308.

In *Remer v. Interstate Bond Co.*, 21 Ill.2d 504, 173 N.E.2d 425 (1961), this court again observed that a county court's findings that the statutory prerequisites to issuing a tax deed had been complied with could not be challenged collaterally, unless a lack of jurisdiction appeared on the face of the record. *Remer*, 21 Ill.2d at 510, 173 N.E.2d 425. However, this court also stated that allegations of fraud could be raised in a collateral attack upon the tax deed order. We reasoned that such allegations fit within the requirements of section 72 and that "elementary principles of law require that relief be granted" where "proceedings regular in form are tainted with fraud and coercion." *Remer*, 21 Ill.2d at 514, 173 N.E.2d 425. Thereafter, in *Urban v. Lois, Inc.*, 29 Ill.2d 542, 194 N.E.2d 294 (1963), we reiterated this rule, stating:

> "It has been well established in tax-deed proceedings that section 72 cannot be used as a vehicle to relitigate any issue already passed on by the trial court, in the absence of fraud." *Urban*, 29 Ill.2d at 548, 194 N.E.2d 294.

In so holding, we explained why the scope of collateral attack upon the tax deed order was a limited one:

> "If we were to hold otherwise, we would abrogate the efficacy of the 1951 amendments to the Revenue Act, and would defeat the desired conclusiveness of the county court's order for the issuance of a tax deed. The consequent effect upon the merchantability of tax titles would place the annual sale in the same status as existed before the 1951 amendments and which the legislature intended to change." *Urban*, 29 Ill.2d at 549, 194 N.E.2d 294.

In 1967, the legislature amended section 266 of the Revenue Act to state that relief from an order granting a tax deed could be had under section 72 of the Civil Practice Act, thereby expressly confirming this court's holding to that

effect in *Southmoor Bank*. See Ill.Rev.Stat.1967, ch. 120, par. 747.

In 1982, in *In re Application of the County Treasurer*, 92 Ill.2d 400, 408, 65 Ill.Dec. 905, 442 N.E.2d 216 (1982), this court again addressed the scope of collateral relief available in tax deed cases. After reviewing the relevant case law, as well as various revisions that had been made to the Revenue Act by the General Assembly, we concluded that the legislature intended to protect tax deed orders from collateral attack "on questions relating to notice." *County Treasurer*, 92 Ill.2d at 408, 65 Ill.Dec. 905, 442 N.E.2d 216. Accordingly, we chose to "adhere to our previous holdings that section 72 relief in tax-deed cases is limited to those cases where fraud is proved or the judgment is void." *County Treasurer*, 92 Ill.2d at 408, 65 Ill.Dec. 905, 442 N.E.2d 216.

During the 1990s, the legislature twice addressed the issue of collateral challenges to tax deed orders. In amendments to section 266 of the Revenue Act that were adopted in 1990, the General Assembly codified the holdings of decisions such as *County Treasurer* and *Urban* with respect to the grounds for relief that are available in a collateral attack upon a tax deed order. See 86th Ill. Gen. Assem., Senate Proceedings, May 10, 1990, at 62 (statements of Senator Lechowicz). In addition, the legislature created a new, statutory ground for collateral relief that is available in certain circumstances where the tax deed order "was effectuated pursuant to a negligent or willful error made by an employee of the county clerk or county collector." Ill.Rev.Stat.1991, ch. 120, par. 747. Also, the 1990 amendments added language to section 266 which states that the grounds for relief that are available in a collateral attack upon a tax deed order "shall be limited" to those enumerated in the statute. See Ill.Rev.Stat.1991, ch. 120, par. 747.

In 1993, the General Assembly created an additional statutory ground for collateral relief from a tax deed order. Generally stated, this ground may be invoked by a person or party with a recorded interest in the tax deed property who was not served with notice in any manner whatsoever. See 35 ILCS 200/22-45(4) (West 1994).

The amendments enacted by the General Assembly in 1990 and 1993 are currently found in section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). Section 22-45 expresses the balance struck by the legislature between the public policies of allowing collateral relief from tax deed orders and preserving the marketability of tax deeds. Section 22-45 provides:

> "Tax deeds issued under Section 22-35[4] are incontestable except by appeal from the order of the court directing the county clerk to issue the tax deed. However, relief from such order may be had under Section 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under that Section with respect to final orders and judgments in other proceedings. The grounds for relief under Section 2-1401 shall be limited to:
>
> (1) proof that the taxes were paid prior to sale;
>
> (2) proof that the property was exempt from taxation;
>
> (3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

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[4] This reference to "Section 22-35" has been changed to "Section 22-40." See 35 ILCS 200/22-45 (West Supp. 204).

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Sections 22-10 through 22-30.

In cases of the sale of homestead property in counties with 3,000,000 or more inhabitants, a tax deed may also be voided by the court upon petition, filed not more than 3 months after an order for tax deed was entered, if the court finds that the property was owner occupied on the expiration date of the period of redemption and that the order for deed was effectuated pursuant to a negligent or willful error made by an employee of the county clerk or county collector during the period of redemption from the sale that was reasonably relied upon to the detriment of any person having a redeemable interest." 35 ILCS 200/22-45 (West 1994).

In the case at bar, the public guardian argues that the tax deed issued to Apex should be set aside because there is "clear and convincing evidence" that the tax deed order was "procured by fraud or deception." 35 ILCS 200/22- 45(3) (West 1994). The public guardian notes that, at the hearing on Apex's petition for issuance of a tax deed order, Apex's attorney represented to the circuit court that it had strictly complied with the Property Tax Code's notice provisions, that it had been unable to ascertain Mary Lowe's whereabouts despite having conducted a diligent search, and that there were "no minors, incompetents, or estates that appear to have an interest in the property." The public guardian contends that "in view of Apex's willful ignorance

with respect to the notations on the undelivered envelopes" these representations constitute fraud or deception under section 22-45 and, therefore, that the tax deed issued to Apex should be set aside.

In the context of tax deed proceedings, fraud is defined as " 'a wrongful intent--an act calculated to deceive.' " *County Treasurer*, 92 Ill.2d at 405, 65 Ill.Dec. 905, 442 N.E.2d 216, quoting *Dahlke v. Hawthorne, Lane & Co.*, 36 Ill.2d 241, 245, 222 N.E.2d 465 (1966); see also *Smith v. D.R.G., Inc.*, 63 Ill.2d 31, 37, 344 N.E.2d 468 (1976); *Exline v. Weldon*, 57 Ill.2d 105, 110, 311 N.E.2d 102 (1974); *Zeve v. Levy*, 37 Ill.2d 404, 409, 226 N.E.2d 620 (1967). This level of wrongdoing has not been established here.

The envelopes with Jewel Hightower's notations on them were returned by the post office to their sender, the Cook County sheriff. The sheriff submitted the envelopes to the clerk of the circuit court, who then placed the envelopes in the court file which, by statute, the clerk is required to maintain in tax deed cases. See, *e.g.*, 35 ILCS 200/22-20, 22-25 (West 1994). There was nothing unusual or unexpected about the fact that the envelopes were returned, undelivered. Both an agent from Apex and a deputy sheriff from the Cook County sheriff's office had visited the property, found it vacant, and been told by neighbors that the occupants of the home had moved. Further, the notations on the envelopes addressed to Mary Lowe and "occupant," though legible, cannot reasonably be called prominent. The notations have a line drawn through them and they are partially obscured by the circuit court clerk's filing stamps and the post office's "returned to sender" stamps. More important, there is no evidence that Apex attempted to conceal the notations or alter the envelopes in any way. To the contrary, the envelopes were submitted into evidence by Apex along with the other portions of the record, and the circuit court

explicitly relied upon them in rendering its decision to enter the tax deed order.

On this record, the most that can be said with respect to Apex's actions is that Apex simply failed to discover the notations on the envelopes. However, as this court has frequently noted, the failure to undercover a particular fact during the search for a delinquent taxpayer does not, by itself, establish fraud. *Dahlke*, 36 Ill.2d at 246, 222 N.E.2d 465; *Exline*, 57 Ill.2d at 110, 311 N.E.2d 102 ("even if a more persistent effort could have been made in the conduct of the search and inquiry [for the delinquent taxpayer], this is not proof of fraud unless there exists evidence of wrongful intent or a deceptive design"); *Zeve*, 37 Ill.2d at 409, 226 N.E.2d 620; see also *County Treasurer*, 92 Ill.2d at 407-09, 65 Ill.Dec. 905, 442 N.E.2d 216 (error in service which was at most negligence did not constitute fraud). Moreover, the fact that the envelopes were submitted into evidence and relied upon by the circuit court is a strong indication that there was no deceptive or fraudulent act on the part of Apex. See *In re Application of the County Treasurer & ex officio County Collector*, 267 Ill.App.3d 993, 998-99, 204 Ill.Dec. 840, 642 N.E.2d 741 (1994) (no deceptive act takes place when all relevant information is openly presented to the court); *In re Application for Judgment & Sale by the County Treasurer & ex officio County Collector*, 276 Ill.App.3d 1084, 1090, 213 Ill.Dec. 541, 659 N.E.2d 457 (1995) (same); *In re Application of County Treasurer & Ex-Officio County Collector*, 20 Ill.App.3d 291, 298, 314 N.E.2d 300 (1974) (same).

The record in this case does not show, by clear and convincing evidence, "a wrongful intent" or "an act calculated to deceive." *Dahlke*, 36 Ill.2d at 245, 222 N.E.2d 465. Accordingly, we affirm the circuit court's judgment that the tax deed order was not obtained by fraud or deception.

Citing to *In re Application of the County Collector for Judgment & Order of Sale Against Lands & Lots Returned Delinquent for Nonpayment of General Taxes for the Year 1982 & Prior Years*, 202 Ill.App.3d 405, 147 Ill.Dec. 666, 559 N.E.2d 1006 (1990), the public guardian also argues that, even if Apex's actions were not fraudulent, this court should invoke its "equitable powers" to void the tax deed order and return the property at issue to Mary Lowe's estate. The public guardian argues that Mary Lowe lost her home through no fault of her own, and emphasizes that Judge Staniec, in the affidavit which he submitted to the circuit court, stated that he would not have issued the tax deed order if he had known that Lowe was hospitalized in 1995 and 1996. According to the public guardian, it would be unjust not to allow Lowe's estate to recover the property and, therefore, under principles of equity, the tax deed should be set aside.

In *County Collector*, a tract search prepared from a title company's own tract indices, rather than official public records, failed to disclose a properly recorded mortgage. Relying on the results of the tract search, and not knowing that the results were inaccurate, the circuit court issued a tax deed order. *County Collector*, 202 Ill.App.3d at 408-09, 147 Ill.Dec. 666, 559 N.E.2d 1006. Thereafter, the holder of the properly recorded mortgage filed a section 2-1401 petition, seeking to have the tax deed set aside. Because the tax deed order had not been obtained by fraud, the circuit court declined to vacate it. However, the circuit court stated that it would not have issued the tax deed order had it known of the recorded interest and expressed the opinion that, were equity to apply, the tax deed should be set aside. *County Collector*, 202 Ill.App.3d at 409-10, 147 Ill.Dec. 666, 559 N.E.2d 1006.

On appeal, the appellate court reversed. Citing to *In re Application of the County Treasurer & Ex Officio County*

Collector of Cook County, Illinois, for Judgment & Order of Sale Against Real Estate Rendered Delinquent for the Nonpayment of 1980 Taxes, 185 Ill.App.3d 789, 134 Ill.Dec. 218, 542 N.E.2d 397 (1989), and *In re Application of the County Treasurer & Ex Officio County Collector*, 171 Ill.App.3d 644, 121 Ill.Dec. 545, 525 N.E.2d 852 (1987), two cases in which tax deeds were set aside because of errors committed by the county clerk, the appellate court concluded that not all circumstances under which tax deeds should be set aside fit within the framework of fraud. The appellate court held that "equitable principles" may be relied upon by the courts under section 2-1401 "to afford relief for parties who, through no fault of their own (and through no fraud by any party), stand to lose property in which they have a considerable interest." *County Collector*, 202 Ill.App.3d at 414-15, 147 Ill. Dec. 666, 559 N.E.2d 1006. The appellate court observed that the case before it was one in which " 'no attempt was made to serve the interested party by any means'" (*County Collector*, 202 Ill.App.3d at 413, 147 Ill. Dec. 666, 559 N.E.2d 1006), and that it would be unjust to let the tax deed stand. Accordingly, the appellate court vacated the tax deed order. County Collector, 202 Ill.App.3d at 416-17, 147 Ill. Dec. 666, 559 N.E.2d 1006.

County Collector, and the appellate decisions it relied upon, are not helpful to the public guardian in the case at bar because those cases were decided prior to the passage of the 1990 amendments to section 266 of the Revenue Act. At the time *County Collector* was decided, section 266 stated that relief from tax deed orders could be had under section 2-1401 "in the same manner, upon the same grounds and to the same extent as may be had under that Section with respect to final orders, and judgments in other proceedings." Ill.Rev.Stat.1989, ch. 120, par. 747. The scope of collateral challenges to tax deed orders was thus a matter of judicial decision as to what constituted appropriate grounds for relief

under section 2-1401. See, *e.g.*, *County Collector*, 202 Ill.App.3d at 410, 147 Ill.Dec. 666, 559 N.E.2d 1006. After the passage of the 1990 amendments, this was no longer the case. The 1990 amendments added language, currently found in section 22-45 of the Property Tax Code, which states that "[t]he grounds for relief under Section 2-1401 shall be limited to" those enumerated in the statute. 35 ILCS 200/22-45 (West 1994). General, "equitable principles" is not one of the grounds for relief listed in section 22-45.

Further, we note that the result reached by *County Collector*, *i.e.*, that a party with a recorded interest in property who receives no section 22-10 notice whatsoever may seek relief under section 2-1401, has been codified by the General Assembly in section 22-45(4) (35 ILCS 200/22-45(4) (West 1994)). In addition, clerical error has been added as a basis for redemption. See 35 ILCS 200/22-45 (West 1996). However, while the General Assembly has enacted these specific grounds for relief, it has not enacted the broader holding, found in *County Collector*, that general, equitable principles are a basis for relief in all collateral challenges to tax deed orders brought under section 2-1401.

At present, section 22-45 does not contain, as a ground for relief, a general equity provision. See *In re Application of the County Treasurer & ex officio County Collector*, 304 Ill.App.3d 502, 505, 238 Ill.Dec. 109, 710 N.E.2d 906 (1999); In re McKeever, 132 B.R. 996, 1015 (Bankr.N.D.Ill.1991); D. Karlen & R. Slutzky, *A Guide to Tax Deed and Indemnity Fund Proceedings*, in Real Estate Taxation § 11.31, at 11-63 (Ill. Inst. for Cont. Legal Educ.2005). Accordingly, we may not consider the public guardian's argument that the tax deed at issue in this case should be set aside, under section 2-1401, based on equitable principles.

This is not to say, however, that the General Assembly is unconcerned about achieving equity in cases such as this, or that Mary Lowe's estate has no statutory remedy. As the circuit court below noted, an alternative form of relief is available to Lowe's estate under the indemnity provisions of the Property Tax Code. See 35 ILCS 200/21-295 *et seq.* (West 1994). The indemnity provisions were enacted by the legislature in 1970 in recognition of the fact that taxes may go unpaid, and property may be lost to a tax deed, because of circumstances such as mental or physical disability that are beyond the property owner's control. See G. Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 51 Chi-Kent L.Rev. 725, 733 (1974). The provisions create an indemnity fund, from which, pursuant to section 21-305 (35 ILCS 200/21-305 (West 1994)), the former property owner may seek a monetary award for the loss of property. At the time relevant here, section 21-305 provided:

> "(a) Any owner of property sold under any provision of this Code, who without fault or negligence of his or her own sustains loss or damage by reason of the issuance of a tax deed under Sections 22-40 or 21-445 and who is barred or in any way precluded from bringing an action for the recovery of the property or any owner of property containing 4 or less dwelling units who resided thereon the last day of the period of redemption who, in the opinion of the Court which issued the tax deed order, is equitably entitled to just compensation, has the right to indemnity for the loss or damage sustained. Indemnity shall be limited to the fair cash value of the

property as of the date that the tax deed was issued, less any mortgages or liens thereon.[5]

* * * The Court shall liberally construe this Section to provide compensation wherever in the discretion of the Court the equities warrant such action." 35 ILCS 200/21-305 (West 1994).

Section 21-305 is well suited to achieve equity in this case. Mary Lowe is deceased. Moreover, although the record does not indicate when any member of Lowe's family last resided in her former home, at a minium, it would have been sometime before Lowe's hospitalization in 1995. Thus, in this case, the importance of the property at issue is not as a place of residence to Mary Lowe or her family, but as the primary asset in Lowe's estate. The indemnity fund can fully compensate Lowe's estate for the monetary value of the property. Further, John Herndon has indicated that, if the tax deed is set aside and the property returned to Lowe's estate, he will pursue an action against the estate to recover the $20,000 worth of improvements he made to the home. Even if such action proves unsuccessful, the estate would bear the cost of defending against the action. Using the indemnity provisions can give the estate the full value of the property without having to withstand the time and expense of any legal action brought by Herndon.

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[5] Sections 21-305 has since been amended to make clear that an owner who resides on property with four or fewer dwelling units, and who is seeking an award of $99,000 or less, may recover from the indemnity funds by showing equitable entitlement. The owner does not have to show a lack of fault or lack of negligence for the loss. 35 ILCS 200/21-305 (West 2000). See also *Hedrick v. Bathon*, 319 Ill. App. 3d 599 (2001).

The General Assembly enacted the indemnity provisions to address situations such as that presented in the case at bar. The record indicates that the public guardian has filed a petition for indemnification on behalf of Mary Lowe and that the petition remains pending in the circuit court. After issuing its ruling in this case, the circuit court strongly urged the public guardian to continue the indemnification action on behalf of Mary Lowe's estate. We do so as well.

Due Process Notice

The public guardian argues that the tax deed issued to Apex should be set aside because Mary Lowe was denied her "due process right to adequate notice" under the United States and Illinois Constitutions (U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, §2) prior to the deprivation of her property.

The public guardian's due process argument focuses on the period from August 26, 1995, to December 17, 1996, when Lowe was hospitalized in the Tinley Park Mental Health Center with schizophrenia. It was during this time that Apex filed its petition for a tax deed and that Apex attempted to provide Lowe with the section 22-10 take notice pursuant to the procedures described in sections 22-15 through 22-25 of the Property Tax Code (35 ILCS 200/22- 15 through 22-25 (West 1994)). We note, however, that under the Property Tax Code, a number of notice procedures must take place prior to the delivery and publication of the section 22-10 take notice. For example, before the county collector may offer a property for sale due to delinquent taxes, it must file an application for judgment and order of sale in the circuit court. The county collector must send notice of the application for judgment by certified or registered mail to the party in whose name the property taxes were last assessed not less than 15 days before the date of application for judgment is filed. See 35 ILCS 200/21-135 (West 1994). In addition, the collector

must publish notice of its intent to file the application for judgment at least 10 days before the application is filed. See 35 ILCS 200/21-110, 21-115 (West 19[illegible]. Pursuant to section 21-175 (35 ILCS 200/21-175 (West 1994)), the county collector must present the application for judgment to the circuit court. At that time, those parties who wish to contest the application may appear and file objections. *Rosewell v. Chicago Title & Trust Co.*, 99 Ill.2d 407, 414, 76 Ill.Dec. 831, 459 N.E.2d 966 (1984).

Once the circuit court has entered an order of sale, and the tax sale has been completed, additional notice must be provided. Section 22-5 of the Property Tax Code requires the county clerk to send a "take notice" by registered or certified mail to the party in whose name the taxes were last assessed, "within 5 months"[6] after the date of the tax sale. See 35 ILCS 200/22-5 (West 1994). The section 22-5 take notice is similar, though not identical, to the section 22-10 take notice. The section 22-5 take notice must state, *inter alia*, that the property has been sold for delinquent taxes, that a petition for a tax deed will be filed, and that the taxpayer has a right to redeem the property by the date listed.[7] [FN6] However, unlike the section 22-10 take notice, the section 22-5 take notice does not include the time and place the petition for the tax deed order will be heard. See 35 ILCS 200/22- 5, 22-10 (West 1994).

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[6] Section 22-5 has since been amended to state that the notice in that provision must be given "within 4 months and 15 days" of the tax sale. 35 ILCS 200/22-5 (West 2000).

[7] The date listed for the expiration of the redemption period may differ between the section 22-5 take notice and the section 22-10 take notice depending on whether the tax purchaser extends the redemption period and, if so, when that extension is made. See 35 ILCS 200/21-385 (West 1994)

In the case at bar, it is undisputed that Mary Lowe was mentally incapacitated from January 1995 through October 1996. However, the tax sale in this case, and the time periods for the procedures noted above, occurred in 1993. The circuit court made no finding regarding the competency, or incompetency, of Mary Lowe in 1993. Moreover, while Dr. Rubin testified as to Lowe's incapacity in 1995 and 1996, he did not testify with respect to her condition in 1993. Thus, it appears that, prior to the deprivation of her property, and at a time when there is no finding of record that she was incompetent, Lowe was given notice of the application for judgment and order of tax sale, had an opportunity to object to the application for judgment, was given notice that the tax sale had occurred, and was given notice that she had the right to redeem her property.

The fact that the Property Tax Code contains several notice procedures that must be undertaken before the delivery and publication of the section 22-10 take notice raises an important question. In deciding whether Mary Lowe was denied her due process right to notice prior to the deprivation of her real property, should all of the tax sale and tax deed notice procedures found in the Property Tax Code--including the notice of the application for judgment and order of sale and the section 22-5 take notice--be considered? Or, as the public guardian suggests, should the procedures regarding the section 22-10 take notice be considered by themselves?

In *Rosewell v. Chicago Title & Trust Co.*, 99 Ill.2d 407, 76 Ill.Dec. 831, 459 N.E.2d 966 (1984), this court considered "whether due process requires the county collector to give personal notice of an impending tax sale to all parties with an interest in the real estate." *Rosewell*, 99 Ill.2d at 410, 76 Ill.Dec. 831, 459 N.E.2d 966. In answering this question in the negative, we examined the Property Tax Code as a whole and took note of the notice procedures, other than the notice

provided for the tax sale, that are found in the Property Tax Code. We concluded that due process does not require that all interested parties receive personal notice of the tax sale in part because, after the tax sale occurs, the Property Tax Code requires that the interested parties receive notice by mail of the right to redemption. Only after this notice is sent are the parties' interests in the property finally terminated by the issuance of the tax deed order. *Rosewell*, 99 Ill.2d at 414-16, 76 Ill.Dec. 831, 459 N.E.2d 966. In the case at bar, neither party addresses the analysis employed in *Rosewell* or discusses what effect, if any, compliance with the statutory notice procedures that precede the delivery and publication of the section 22-10 take notice would have on the public guardian's argument that due process was not satisfied in this case. However, we need not attempt to resolve this issue *sua sponte*. For reasons that follow, we conclude that, even if our due process analysis is limited solely to a consideration of the procedures involving the section 22-10 take notice, and to the time period from 1995 to 1996, there is no basis for reversing the judgment of the appellate court.

The standard for determining whether statutory notice procedures meet the requirements of due process is set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See *Rosewell*, 99 Ill.2d at 411-12, 76 Ill.Dec. 831, 459 N.E.2d 966 (applying *Mullane* to a claim brought against the Property Tax Code under the due process clause of the Illinois Constitution). At issue in *Mullane* was whether notice that was published in a newspaper in order to inform the beneficiaries of a common trust of a judicial settlement satisfied due process. Addressing this issue, the Supreme Court stated what has become the widely accepted test for determining the constitutionality of notice procedures:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873.

In adopting the "reasonably calculated" standard, the Court explained that the method used to provide notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it" and that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315, 70 S.Ct. at 657, 94 L.Ed. at 874. The Court also emphasized, however, that "if with due regard for the practicalities and peculiarities of the case" the notice procedure reasonably conveys the necessary information, then "the constitutional requirements are satisfied." *Mullane*, 339 U.S. at 314-15, 70 S.Ct. at 657, 94 L.Ed. at 873. Applying these principles to the issue before it, the Court held that notice by publication was sufficient for those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained." *Mullane*, 339 U.S. at 317, 70 S.Ct. at 659, 94 L.Ed. at 875. However, publication notice was not sufficient for those "known present beneficiaries of known place of residence." *Mullane*, 339 U.S. at 318-20, 70 S.Ct. at 659-60, 94 L.Ed. at 875-76.

In 1983, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), the Supreme Court considered the principles announced in *Mullane* within the context of a tax sale. At issue in *Mennonite* was the constitutionality of an Indiana statute that provided notice to a mortgagee of a pending tax sale only by publication. The Court held the statutory procedure invalid, stating that "[n]otice by mail or other means as certain to

ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party * * * if its name and address are reasonably ascertainable." (Emphasis in original.) *Mennonite*, 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188. In so holding, the Court stated that a governmental body charged with providing notice must make "reasonably diligent efforts" to locate the party to whom notice is being provided, but also stressed that the government is not "required to undertake extraordinary efforts to discover the identity and whereabouts of a [party] whose identity is not in the public record." *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4. See also *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 1347, 99 L.Ed.2d 565, 578 (1988) (the executor of an estate must make " 'reasonably diligent efforts' " "to uncover the identities of creditors. For creditors who are not 'reasonably ascertainable,' publication notice can suffice"), quoting *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4.

The notice procedures in the Property Tax Code have been held constitutional under *Mullane* and *Mennonite* by this court and others. See *Rosewell*, 99 Ill.2d 407, 76 Ill.Dec. 831, 459 N.E.2d 966; *Balthazar v. Mari Ltd.*, 301 F.Supp. 103 (N.D.Ill.1969), *aff'd*, 396 U.S. 114, 90 S.Ct. 397, 24 L.Ed.2d 307 (1969); *Catoor v. Blair*, 358 F.Supp. 815 (N.D.Ill.1973), *aff'd*, 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 231 (1973). The public guardian points out, however, that none of these decisions addressed the due process rights of the mentally ill in the context of tax sale cases. This issue was, however, considered by the United States Supreme Court in *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956).

In *Covey*, the Supreme Court applied the principles of *Mullane* to a municipal tax lien sale where the delinquent taxpayer had no guardian and was known by town officials "to be a person without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. at 1026. Although the town officials had complied with the notice procedures found in the governing statute, the Court held that, given the taxpayer's mental incapacity, due process had not been afforded. Citing to *Mullane's* "reasonably calculated" standard, the Court stated that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the requirement of due process]." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. at 1026. Because the taxpayer "was wholly unable to understand the nature of the proceedings against her property" and because "the town authorities knew her to be an unprotected incompetent," the Court held that due process requirements had not been met. *Covey*, 351 U.S. at 147, 76 S.Ct. at 727, 100 L.Ed. at 1026. See also *In re Application of the County Collector for Judgment & Order Sale Against Lands & Lots Returned Delinquent for Nonpayment of General Taxes for the Year 1982 & Prior Years*, 188 Ill.App.3d 1068, 136 Ill.Dec. 621, 545 N.E.2d 145 (1989) (applying Covey).

Although *Covey* involved a situation where the government had *actual* knowledge of the delinquent taxpayer's mental incapacity, the public guardian argues that the case may also be read as applying to those situations where the party charged with providing notice *should* have known of the taxpayer's incapacity. Applying this reading of *Covey* to the case at bar, the public guardian argues that Mary Lowe's due process rights were violated because Apex should have known of Lowe's mental illness. The public guardian reasons that, if Apex had been more diligent in

conducting its search for Mary Lowe, it would have noticed the notations on the envelopes that were returned by the post office and filed by the sheriff in the circuit court. If Apex had noticed the notations, according to the public guardian, it would have known of Lowe's hospitalization, and would have known that the initials and numbers on the envelope belonged to a postal carrier. With this knowledge, Apex could have contacted the post office and learned that Lowe was in a mental hospital. And, once Apex knew that Lowe was in a mental hospital, it would have known that she was suffering from a mental disability. Thus, according to the public guardian, Apex should have known of Lowe's mental illness and, under *Covey*, due process was not satisfied. [8]

The circuit court below rejected the argument that Covey controlled here. The court held that even if Apex should have known that Lowe was hospitalized, this did not mean that Apex should have known of Lowe's mental illness. As the court explained, there are many reasons for which an individual may be hospitalized that have nothing to do with mental illness. We do not disagree with the circuit court's reasoning. However, we conclude that there is a more fundamental difficulty with the public guardian's argument, namely, the fact that the argument rests on the assertion that Apex did not conduct a diligent inquiry into ascertaining Mary Lowe's whereabouts.

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[8] The public guardian's argument is directed toward Apex and its purported failure to take adequate steps to notify Mary Lowe. Apex is a private party. Nevertheless, Apex does not dispute that it made "use of state procedures with the overt, significant assistance of state officials" (*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486, 99 L.Ed. 2D 565, 576, 108 S. Ct. 1340, 1345 (1988), so that sufficient state action exists here to invoke the protections of due process. See also F. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 Ind. L. J. 747, 764 n. 102 (2000).

Section 22-15 of the Property Tax Code (35 ILCS 200/22-15 (West 1994)) requires the tax purchaser to make a "diligent inquiry" to locate the property owner and interested parties when attempting to serve the section 22-10 take notice. This "diligent inquiry" is also a constitutional requirement. See *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4 (due process requires that "reasonably diligent efforts" be made to locate the party to whom notice is being served); *Tulsa*, 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578 (same). In this case, when the circuit court entered the tax deed order in May of 1996, it held that Apex had made a diligent inquiry to locate Mary Lowe, thereby satisfying statutory and constitutional requirements.

In arguing that *Covey* controls here, the public guardian is attempting to relitigate the circuit court's diligent inquiry finding. The public guardian's contention is that Apex was not diligent in searching for Mary Lowe, and that if it had been, it would have learned that Lowe was hospitalized and suffering from mental illness. However, the circuit court's diligent-inquiry finding may not be challenged in a section 2-1401 petition, other than for the reasons given in section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). And, as previously discussed, we have concluded that the only ground under section 22-45 that is relevant here, *i.e.*, fraud or deception (see 35 ILCS 200/22-45(3) (West 1994)), has not been proven.

To hold in this case that the public guardian may reopen the circuit court's diligent-inquiry finding would run counter to the principles of finality for tax deed orders that have existed, and been approved by this court, since at least 1958. See Southmoor Bank & Trust Co. v. Willis, 15 Ill.2d 388, 396, 155 N.E.2d 308 (1958) (unless a lack of jurisdiction affirmatively appears on the record, the prior findings of the

court of compliance with all the provisions of law entitling the tax purchaser to a tax deed cannot be disputed in a collateral proceeding). We decline to so hold. Accordingly, we do not further consider the public guardian's argument that the present case falls under Covey because Apex failed to conduct a diligent inquiry to locate Mary Lowe.

The public guardian raises an additional constitutional argument that does not require reexamination of the circuit court's diligent inquiry finding. The public guardian contends that the Property Tax Code is unconstitutional as applied to all individuals, such as Mary Lowe, who are hospitalized with a disabling mental illness during the section 22-10 notice period, regardless of whether the tax purchaser has knowledge of the mental illness. According to the public guardian, the notice procedures for the section 22-10 take notice are unconstitutional because, even if the notice is actually received by the mentally disabled person, it will not be effective, i.e., the person will not be able to understand or act upon it. As the public guardian states, "even if [Mary Lowe] had been served the notice [it] would have been meaningless to her due to her cognitive impairments."

This is not the proper test for assessing the constitutionality of a notice procedure. In determining whether a notice procedure is constitutional, the question is not whether the procedure actually succeeds in notifying the individual but, rather, whether the procedure is reasonably calculated to do so. As the United States Supreme Court has stated, "[The *Mullane* standard] does not say that the State *must provide* actual notice, but that it *must attempt to provide* actual notice." (Emphases in original.) *Dusenbery v. United States*, 534 U.S. 161, 170, 122 S.Ct. 694, 701, 151 L.Ed.2d 597, 606 (2002). See also *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 284 (6th Cir.2005); *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246 (2d Cir.1995); 16B Am.Jur.2d

Constitutional Law § 937 (1998) ("If a party employs a procedure reasonably calculated to achieve notice, a successful achievement is not necessary to satisfy due process requirements"). This point--that a notice procedure need not actually succeed in providing notice to satisfy due process concerns--was noted in *Mullane*:

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317, 70 S.Ct. at 658, 94 L.Ed. at 875.

Moreover, contrary to the public guardian's argument, whether the tax purchaser has knowledge of the delinquent taxpayer's mental illness is a factor that cannot be excluded from the due process analysis. *Mullane* holds that "all the circumstances" (*Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873) of a case must be considered in analyzing the reasonableness of any notice procedure. See also *Mennonite*, 462 U.S. at 799, 103 S.Ct. at 2712, 77 L.Ed.2d at 188 (describing *Covey's* holding that the state must make additional efforts to provide notice to a mentally incompetent individual as resting on the fact that the state was "aware of [the] party's" incompetence).

In addition, the Supreme Court has expressly held that the notifying party's knowledge of the location and status of the person to be notified conditions the level of notice that must be provided. See *Mennonite*, 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188 ("[n]otice by mail or other means as certain to ensure actual notice" is required only if the

party's whereabouts are "reasonably ascertainable"); *Tulsa*, 485 U.S. at 490-91, 108 S.Ct. at 1347-48, 99 L.Ed.2d at 578-79 (an executor of an estate must provide notice by mail or other means as certain to ensure actual notice to a creditor, but only if the creditor's "identity as a creditor was known or reasonably ascertainable," otherwise, publication notice can suffice).

In light of the foregoing, we conclude that, in considering the constitutionality of the notice procedures set forth in sections 22-10 through 22-25 of the Property Tax Code as applied to those who are hospitalized for mental illness, the relevant question is not whether those procedures ultimately succeed in providing actual notice. Rather, the relevant question is whether the procedures require the tax purchaser to make "reasonably diligent efforts" (*Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4; *Tulsa*, 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578) to locate and identify the hospitalized individual as a mentally disabled person entitled to the protections discussed in *Covey*.

The Property Tax Code does not include procedures that are addressed specifically to those individuals who are hospitalized for mental illness. Nothing in the Property Tax Code, for example, requires tax purchasers to contact mental-health facilities or other hospitals and ask whether the delinquent taxpayer is a patient. Such a procedure would correct the problem that is present in this case. If the hospital told the tax purchaser that the taxpayer was, in fact, a patient and had been admitted with a mental illness, the tax purchaser would be on notice of the taxpayer's incompetence and *Covey* would apply.

However, such a procedure would also be illegal under Illinois law. Section 3(a) of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS

110/3(a) (West 2000)) states: "(a) All records and communications shall be confidential and shall not be disclosed except as provided in this Act." "Communications" include "information which indicates that a person is a recipient [of mental-health services]." 740 ILCS 110/2 (West 2000)). Any person who knowingly and willfully discloses confidential communications is guilty of a Class A misdemeanor. 740 ILCS 110/16 (West 2000). Nothing in the Mental Health and Developmental Disabilities Confidentiality Act permits hospitals to disclose the fact that an individual is a recipient of mental-health services to tax purchasers.[9]

The public guardian does not suggest that the privacy protections afforded the mentally ill in the Mental Health and Developmental Disabilities Confidentiality Act are unconstitutional or that they can in any way be altered by this court. Nor has the public guardian identified any other procedure, in addition to the diligent inquiry requirement already found in the Property Tax Code, which would enable the tax purchaser to learn that the delinquent taxpayer is hospitalized and suffering from mental illness. Thus, the notice procedures in the Property Tax Code embody all that can be done under existing law to locate and identify a delinquent taxpayer who is hospitalized for mental illness.

The public guardian cites to three decisions from other jurisdictions in support of its argument the Property Tax Code is unconstitutional as applied to those who are hospitalized for mental illness. See *In re Consolidated Return of the Tax Claim Bureau*, 75 Pa.Cmwlth. 108, 461 A.2d 1329 (Pa.Commw.1983); *Blum v. Stone*, 127 A.D.2d 549, 511

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[9] In the case at bar, Mary Lowe's medical records were obtained only after the circuit court issued a subpoena.

N.Y.S.2d 638 (1987); *Vance v. Federal National Mortgage Ass'n*, 988 P.2d 1275 (Okla.1999). The appellate court distinguished these cases on their facts. To the extent that they are not factually distinguishable, and support the public guardian's position in this case, we conclude that these decisions are not persuasive. The decisions commit the same error that the public guardian does, *i.e.*, they conclude that due process requires actual notification, rather than reasonable notice procedures. Further, none of these cases address the privacy rights of the mentally ill nor do they identify what procedures could be put into place to correct the problem of notifying individuals who are hospitalized with mental illness.

"The most important criterion in the area of procedural due process is 'reasonableness.' "*Rosewell*, 99 Ill.2d at 412, 76 Ill.Dec. 831, 459 N.E.2d 966. Because the notice procedures involving the section 22-10 take notice encompass all that can be done to locate and identify the hospitalized, mentally ill taxpayer, by definition, those procedures are reasonable. Accordingly, we hold that, as applied to those taxpayers who are hospitalized for mental illness, sections 22-10 through 22-25 of the Property Tax Code meet the requirements of due process.

Finally, we note that the circuit court below, in issuing its ruling, discussed the privacy implications of this case in some detail. The court noted that it is the public policy of Illinois to protect the privacy rights of the mentally ill but that such protection can, as in this case, have unintended consequences that actually work against the interests of the mentally ill. The court went on to suggest that, when a patient is hospitalized for mental illness and no family member or guardian is available, the legislature might consider allowing the hospital to notify the county collector, under seal, of the patient's situation, so that any time periods

relating to the payment of taxes could be tolled. We express no opinion on the wisdom of this suggestion. However, we join in the circuit court's conclusion that the issues raised in this case merit legislative attention.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

Justice KARMEIER took no part in the consideration or decision of this case.

Appendix D

In The Appellate Court Of Illinois First Judicial District

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS, (PETITION OF APEX TAX INVESTMENTS, INC., Petitioner-Appellee, and JOHN HERNDON, Subsequent Transferee and Claimed Beneficial-Interest Holder, Appellee, v. MARY LOWE, deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Respondent-Appellant).

No. 95 CoTD 3812
Sept. 12, 2003

ORDER

The Cook County Public Guardian, on behalf of Mary Lowe's estate, appeals the trial court's order denying its petition to set aside the tax deed issued to Apex Tax Investments, Inc. ("Apex").[1] On appeal, the Public Guardian contends that Apex did not provide Lowe, a mentally incompetent individual, with adequate notice of the tax deed proceedings. The Public Guardian also contends that Apex knew or should have known that Lowe was mentally

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[1] The tax purchaser's name appears in various forms throughout the record including: Apex Tax Investments, Inc.; Apex Tax Investments, Ltd.; Apex Tax Investment; and Apex Properties. The subsequent transferee is John Herndon. For purposes of brevity, we refer to the parties collectively as "Apex" in this order.

incompetent and was obligated to appoint a guardian to Lowe to effectively provide her with notice. The Public Guardian's final contention on appeal is that Apex's representation that it made a diligent inquiry to determine Lowe's whereabouts constituted fraud pursuant to section 22-45 of the Illinois Property Tax Code. For the reasons to follow, we affirm.

Lowe began experiencing psychiatric problems in the early 1960s. Lowe was hospitalized for approximately 16 months from August 25, 1995 to December 16, 1996, when she was released to the care of her son, Bruce Lowe. Lowe died on November 15, 1998.

In 1977, Lowe purchased the property, a single-family, split-level townhouse. Lowe conveyed the property in 1993 through a quitclaim deed to herself and her companion, William Austin, as joint tenants. Austin died in 1994 and Lowe became the sole owner of the property by rights of survivorship.

On March 3, 1993, Apex purchased the property at a tax sale for $347.61, which was the amount of the 1991 property-tax delinquency and fees. Apex filed a petition for the issuance of a tax deed with the circuit court on October 5, 1995. Lowe's right to redeem the property from the tax sale was to expire on February 21, 1996. On March 6, 1996, Apex filed an application for an order directing the issuance of a tax deed. Along with its application, Apex submitted the affidavit of its authorized agent Fred Berke. Berke, among other assertions, stated that "no person interested in said real estate is believed to be a minor or is known to have been adjudicated incompetent."

On March 18, 1996, a hearing was conducted relating to Apex's application for a tax deed. Apex's attorney, Jonathan

Smith, informed the trial court that the redemption period expired and there was no redemption of the property.

At the hearing, Smith also informed the court regarding the parties that were served, the manner they were served and the date they were served. The Cook County Sheriff personally served the following individuals with notice of the tax-deed proceedings: (1) the Cook County Clerk; (2) Starks & Boyd, P.C., the law firm that prepared the 1993 quitclaim deed to the property; and (3) First National Bank of Chicago, a mortgagee of the property. The sheriff also attempted to serve Austin, Lowe and "occupant" with notice on October 26, 1995. The sheriff filed returns of service relating to these individuals on November 9, 1995. On the returns of service, the process server noted that the "house is vacant per neighbors" and checked the line next to "MOVED" indicating the reason for the failure to serve the notice.

The sheriff also sent notice addressed to Austin, Lowe and "occupant" directly to the property by certified mail, return receipt requested. Each of these notices is postmarked November 8, 1995 and is stamped "returned to sender." The word "deceased" was written on the envelope addressed to Austin. The sheriff filed this returned notice with the court on November 22, 1995. The envelopes containing the notices to Lowe and "occupant" bear a stamp indicating unsuccessful attempts to deliver the notices were made on November 16, December 11 and December 18, 1995. Printed on each envelope was "person is hospitalized." The sheriff filed the returned notices with the court on January 2, 1996.

The Clerk of the Circuit Court of Cook County also sent notices to Austin, Lowe, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago by U.S. mail on November 8, 1995. The U.S. Postal Service returned the

notices addressed to Austin, Lowe and "occupant" to the Circuit Clerk after it made unsuccessful attempts to deliver the notices on November 9, November 15, and November 24, 1995. The Circuit Clerk filed the returned notices addressed to Lowe and "occupant" with the court on November 29, 1995, and returned the notice addressed to Austin on November 30, 1995.

Apex also provided publication notice in *The Chicago Daily Law Bulletin* on October 11, October 12, and October 13, 1995.

Fred Berke, Apex's agent, testified on behalf of Apex at the hearing. Berke testified that he visited the property, received no response after knocking on the door, looked into the living room window and did not see any furniture, and was told by a neighbor that Lowe owned the home but no one currently lived there.

Smith, Apex's counsel, also informed the court at the hearing that Apex was "unable to develop any address for William Austin or Mary Lowe other than the subject property address." Smith stated that Lowe's voter registration card was reviewed in an effort to locate Lowe, city and suburban phone directories were checked and notice was served on Starks & Boyd, P.C. Smith also stated that "all regular efforts proved fruitless" in response to the trial court's inquiry regarding the efforts undertaken by Apex to locate Austin and Lowe. The trial court found that Apex exercised due diligence in identifying the identity of interested parties and the location of parties entitled to notice.

The trial court entered an order on May 20, 1996, directing the County Clerk to issue a deed vesting Apex with title to the property. The County Clerk issued a tax deed on the same day.

On September 5, 1997, Mario and Bruce Lowe, Mary's sons, filed a *pro se* petition asking that their mother be restored to ownership of the property. In the petition, Bruce Lowe alleged that his mother was a resident of the Tinley Park Mental Health Center ("TPMHC") from August 26, 1995 to December 1996. The trial court appointed the Cook County Public Guardian as Lowe's attorney and guardian *ad litem*.

The Public Guardian filed a petition on November 10, 1997, to set aside the tax deed issued to Apex based on section 2-1401 of the Code of Civil Procedure and section 22-45 of the Illinois Property Tax Code. 735 ILCS 5/2-1401 (West 1992); 35 ILCS 200/22-45 (West 1996). On April 17, 1998, the Public Guardian filed an amended petition asking the court to set aside the tax deed issued to Apex on the basis that Lowe did not receive notice of the tax deed proceedings and that Apex's efforts to locate Lowe to serve her with notice failed to comport with due process and the statutory notice provisions. The Public Guardian argued that Apex failed to make a diligent inquiry of Lowe's whereabouts after receiving notice of her hospitalization. The Public Guardian further argued that due to Lowe's mental state, even if Lowe received actual notice, the notice did not satisfy due process requirements.

John Herndon entered into a contract with Apex on December 6, 1996, to purchase the property. Attorney Richard Glickman filed his appearance on behalf of Herndon on August 12, 1998. Herndon also filed a motion to dismiss the Public Guardian's amended petition to set aside the tax deed claiming he is a *bona fide* purchaser of the property as a result of the purchase contract with Apex.

The Public Guardian filed a motion for summary judgment on April 14, 1999, asking the court to find that

Herndon was not a *bona fide* purchaser. The trial court granted the Public Guardian's motion for summary judgment on June 8, 1999. The court found no genuine issue of material fact regarding Herndon being a *bona fide* purchaser because Herndon was aware of Lowe's claim to the property.

On September 17, 1999, the Public Guardian filed a motion for summary judgment on the basis that Apex did not comply with the Illinois Property Tax Code and U.S. Constitutional requirements and requested that the court set aside the tax deed. The court denied the motion. In March 2000, Apex and Herndon filed answers to the amended petition to set aside the tax deed.

On September 6, 2000, in response to the information that Lowe died, the trial court entered an order dismissing with prejudice the amended petition to set aside the tax deed. The probate court entered an order appointing the Public Guardian as administrator to collect for Lowe's Estate. The trial court then granted the Public Guardian's motion to vacate the trial court's September 6, 2000, order and to substitute the Public Guardian, now serving as administrator to collect for Lowe's Estate, as the proper party to prosecute the amended petition.

On February 20, 2002, the trial court held an evidentiary hearing relating to the amended petition to set aside the tax deed. The trial court permitted Herndon to participate in the hearing because he was a subsequent purchaser of the property.

At the evidentiary hearing, the Public Guardian called Dr. Bernard Rubin, a psychiatrist and psychoanalyst, to testify. Rubin, an expert in the field of psychiatry, testified that in his opinion Lowe suffered from a disorganized, chronic schizophrenic disorder, the most severe form of

schizophrenia. Rubin also testified that based primarily on his review of the medical records, he believed that from January 1995 until October 1996, Lowe suffered from a mental illness. Rubin further testified that "my understanding is that she would have no understanding of or could not respond to any legal papers as well as any sort of personal or social issues in her life [between January of 1995 and October of 1996]."

The Public Guardian also called Jewel Hightower, a postal employee, to testify. Hightower testified that she was aware of Lowe's mental condition from her own observations and from observations told to her by neighbors. Hightower also testified that she received letters for delivery addressed to Austin, Lowe and "occupant" that appeared to contain "tax statements" or "tax bills." Hightower stated that she knew Austin died, and therefore wrote "deceased" on the envelope. Hightower further stated that she attempted to deliver the letters addressed to Lowe and "occupant" on three separate occasions. After the last attempt, Hightower indicated that she marked on the letters "person is hospitalized" and returned the letters to the sender. Hightower stated that she knew Lowe was hospitalized at TPMHC but postal regulations prohibited her from indicating Lowe's exact location on the envelope. Hightower also stated that she was not contacted regarding the letters with the notation "person is hospitalized" even though her initials and route number were included on the envelope. Hightower continued that she informed the post office of Lowe's location by writing her hospitalization down on a card kept at the post office. Hightower further stated that she did not receive a forwarding request for Lowe's mail.

Lowe was admitted to TPMHC on August 26, 1995. The trial court at the evidentiary hearing admitted Lowe's mental health records from TPMHC as a Public Guardian exhibit.

Lowe's social worker at TPMHC, Dean Conrad, maintained notes relating to Lowe's medical condition. In a note dated February 2, 1996, Conrad wrote that Lowe continued to express grandiose delusional thinking and that she was "unable to realistically address any subject without interjecting delusional thinking." In Conrad's April 12th note, he wrote that Lowe was "unable to carry on a focused, coherent conversation for a 5 min. period of time."

The trial court denied the amended petition to set aside the tax deed on April 9, 2002. The court held that Apex did not procure its tax deed through fraud or deception since the returned certified letters were not filed with the court until January 2, 1996. The trial court also held that although Apex knew Lowe was hospitalized, Apex was not put on notice that she was hospitalized for psychiatric reasons and therefore, had no reason to believe that Lowe was incompetent. The Public Guardian timely appealed the trial court's judgment on April 18, 2002, and filed an amended notice of appeal on May 8, 2002.

On appeal, the Public Guardian first argues that given Lowe's mental incompetency, Apex did not provide adequate notice of the tax deed proceedings as required by the Illinois Property Tax Code and due process. Individuals cannot be deprived of their property by the government without due process of the law. *Mullane v. Central Hanover Bank & Trust Co., et al*, 339 U.S. 306, 315, 70 S. Ct. 652, 657 (1950). Due process requires providing notice to a party that is reasonably calculated to inform the party of the pendency of the action and provide an opportunity to present objections. *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657. With respect to the notice, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The

reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657. Due process is evaluated on the basis of reasonableness. *In re Application of County Collector*, 188 Ill.App.3d 1068, 1075, 545 N.E.2d 145, 149 (1989) (*National Indemnity Corp. v. Otsus*),. Reasonableness does not require "burdensome or elaborate efforts to notify interested parties." *Otsus*, 188 Ill.App.3d at 1075, 545 N.E.2d at 149, citing *Rosewell v. Chicago Title and Trust*, 99 Ill.2d 407, 459 N.E.2d 966 (1984).

A trial court's finding of historical facts are reviewed on a manifest weight of the evidence standard and constitutional based claims are reviewed on a *de novo* standard. See *People v. Crane*, 195 Ill.2d 42, 51-52, 743 N.E.2d 555, 562 (2001).

In support of its position that Apex did not provide adequate notice, the Public Guardian relies on *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724 (1956) and *In re Application of County Collector*, 188 Ill.App.3d 1068, 545 N.E.2d 145 (1989) (*National Indemnity Corp. v. Otsus*). These cases, however, are distinguishable from the instant case.

Covey was a tax-lien foreclosure case involving a mentally incompetent property owner. *Covey*, 351 U.S. at 144, 76 S. Ct. at 726. The court found that the tax purchaser properly complied with the statutory notification requirements, but knew that the property owner was mentally incompetent when it gave the notice. *Covey*, 351 U.S. at 147, 76 S. Ct. at 727. Holding that the property owner's due process rights were violated, the court stated in part that "Notice to a person known to be incompetent who is without the protection of a guardian does not measure up to th[e] requirement[s of due process]." *Covey*, 351 U.S. at 146, 76

S. Ct. at 727. That case is distinguishable from the present case because the trial court found that Apex did not know that Lowe was mentally incompetent when it provided notice to Lowe. We see no basis in the record to disturb that finding.

Otsus also addressed the sufficiency of notice given to an unprotected mentally incompetent individual in a tax-deed proceeding. *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150. Notice of the impending proceedings was given to the property owner Otsus, the Village of Evergreen Park, which is the municipality the property is located in, and PLOWS Council on Aging. *Otsus*, 188 Ill.App.3d at 1070, 545 N.E.2d at 146. In reaching its decision, the *Otsus* court applied the holding of *Covey*. The court held that National had knowledge of Otsus' diminished capacity and that National knew or should have known that the notice given to Otsus would be inadequate to inform Otsus that she could lose her property. *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150.

The Public Guardian contends that the *Otsus* court did not find that National knew, or should have known, that Otsus was incompetent but that the notice to Otsus would be inadequate due to her diminished capacity. The Public Guardian further contends that ambiguity existed regarding National's knowledge of Otsus' mental condition and it is uncertain what role that played in the court's decision. The Public Guardian argues that *Otsus* should not be read as holding that notice to an incompetent homeowner is effective provided the party giving the notice is unaware that the homeowner is incompetent.

We interpret *Otsus* differently. We note that the court explicitly stated that "we can reasonably conclude that both National and the Village knew of Mrs. Otsus' diminished

capacity" and that "National knew or should have known that such notice was inadequate to inform Mrs. Otsus that her interest in her property was at risk." *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150. *Otsus* holds that a party cannot provide constitutionally adequate, meaningful notice to a party knowing that the party cannot comprehend the given notice.

Unlike the tax purchaser in *Otsus*, there was no indication in the present case that when Apex attempted to provide the notice, it knew that Lowe would not adequately understand the notice. After Apex's repeated attempts to personally serve Lowe proved unsuccessful, Apex provided Lowe with notice by publishing it in the Chicago Daily Law Bulletin. Apex's agent, Fred Berke, also personally visited Lowe's last known address and testified that he was told by a neighbor that no one was currently living in the house. We note that Fred Berke was not told by the neighbor that Lowe was mentally incompetent or was institutionalized. Also, the notation on the envelope by the postal worker did not indicate that the person was hospitalized at a mental health center. Here, the record supports the conclusion that Apex did not know of Lowe's mental incapacity and that Apex provided adequate notice regarding the impending tax deed proceedings.

The Public Guardian also raises three cases in its brief from other jurisdictions to support its position that notice to an unprotected mental incompetent does not satisfy the due process guarantee of our constitution. We do not, however, find these decisions controlling and applicable to the instant case.

The Public Guardian first raises *In re Consolidated Return of the Tax Claim Bureau of the County of Delaware*, 461 A.2d 1329 (Pa. Commw. Ct. 1983) (*Appeal of Glyder*

Realty Corp.). The court in that case invalidated a tax sale holding that notice to a person found to be incompetent at the time statutory notice is given and who cannot comprehend the notice does not satisfy constitutional due process requirements. *Appeal of Glyder Realty Corp.*, 461 A.2d at 1332.

The Public Guardian next raises *Blum v. Stone*, 127 A.D.2d 549 (1987). The court held that the 93 year old property owner whose mental condition was deteriorating was not required to prove that the party providing notice had actual or constructive knowledge of her incompetency. *Blum*, 127 A.D.2d at 553, 511 N.Y.S.2d at 641. The court held that reputation evidence was sufficient evidence concerning the owner's lack of mental capacity and to establish the actual or constructive knowledge of her diminished capacity by members of the community. *Blum*, 127 A.D.2d at 552-53, 511 N.Y.S.2d at 641-42.

The last case the Public Guardian raises is *Vance v. Federal National Mortgage Association*, 988 P.2d 1275 (1999). In *Vance*, the court held that a mortgagor's mental status was a material issue of fact precluding summary judgment. *Vance*, 988 P.2d at 1281. The court in that case stated that the due process analysis regarding the sufficiency of notice required an evaluation of the individual's capacity to understand the service of process of the foreclosure proceedings. *Vance*, 988 P.2d at 1281.

We are not convinced that these cases are controlling and applicable to the case at bar in light of the *Otsus* case decided by this court. The *Otsus* decision does not discuss nor refer to either the *Appeal of Glyder Realty Corp.* or *Blum* case, both of which were decided prior to *Otsus*. *Vance* was decided subsequent to *Otsus*, but *Vance* is distinguishable from the other cases because the court in *Vance* focused

primarily on the propriety of summary judgment when an individual's mental state was a material question of fact. The court in *Otsus*, *Appeal of Glyder Realty Corp.*, and *Blum* broadly addressed the sufficiency of notice given to a mentally incompetent individual. We are persuaded by and find controlling this court's reasoning and decision in *Otsus*. To reiterate, this court in *Otsus* invalidated a tax sale because the tax purchaser knew or should have known that its notice to the property owner was inadequate to inform the owner of the impending loss of her property given her lack of mental compentency. *Otsus*, 188 Ill.App.3d at 1076, 545 N.E.2d at 150. For comparable reasons, we are also not persuaded by the federal social security administration cases cited by the Public Guardian. In the instant case, we conclude that Apex provided adequate notice to Lowe, based upon its many and varied attempts to serve her, and its lack of knowledge of her diminished capacity.

The Public Guardian next argues on appeal that since Apex knew or should have known that Lowe was mentally incompetent, Apex should have sought the appointment of a guardian to ensure Lowe received effective notice of the tax deed proceedings. Due process requires providing notice reasonably calculated to inform interested persons of the proceedings and the opportunity to present objections. *Mullane*, 339 U.S. at 314-15, 70 S. Ct. at 657. If an individual's name and address are reasonably ascertainable, notice by mail or other means that ensures actual notice satisfies due process requirements. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712 (1983). Mailing notice to an address known not to be the current address is not reasonably calculated to inform interested persons of the impending proceedings. *Robinson v. Hanrahan*, 409 U.S. 38, 40, 93 S. Ct. 30, 32 (1972).

The Public Guardian contends that when Apex's notices were returned undelivered and bearing the notation "person is hospitalized," Apex had a duty to investigate Lowe's hospitalization. The Public Guardian also contends that this investigation would have revealed that Lowe was hospitalized at a mental health center. Therefore, the Public Guardian argues that Apex must be charged with the knowledge that Lowe was hospitalized at a mental health center and this knowledge obligated Apex to seek the appointment of a guardian to adequately represent her interest in the tax deed proceedings. The Public Guardian further contends that Lowe's due process rights should not be violated because the undelivered notices were filed with the court after the end of the statutory notice period due to either the sheriff, circuit clerk or the post office's delay in returning the notices.

We disagree with the Public Guardian's contention that Apex had an obligation to appoint a guardian because Apex was charged with the knowledge of her mental incompetency from the notation "person is hospitalized." We do agree that an individual known to be without the mental capacity to understand the significance of notice should have a guardian appointed to protect the individual's interest. See *Covey*, 352 U.S. at 146, 76 S. Ct. at 727; *Otsus*, 188 Ill.App.3d at 1076, 545 N.E.2d at 150. Where we differ in this situation with the Public Guardian is that the notation "person is hospitalized" imputes Apex with the knowledge that Lowe was without the mental capacity to understand the significance of the notice. Rather, we agree with the trial court that the notation "person is hospitalized" does not necessarily mean the individual is hospitalized at a mental health center. As the trial court indicated, individuals are hospitalized for numerous reasons. Hospitalization at a mental health center would not first come to mind when learning that a "person is hospitalized."

Moreover, given the other attempts undertaken by Apex to locate Lowe, Apex's failure to investigate the notation does not demonstrate the lack of a diligent inquiry nor charge Apex with constructive knowledge of Lowe's mental condition. Since Apex did not know about Lowe's mental incompetency when it attempted to provide notice, Apex did not violate Lowe's due process rights by failing to appoint a guardian to Lowe.

The Public Guardian's final argument on appeal is that the tax deed should be vacated because Apex's representations that it made a diligent inquiry to locate Lowe's whereabouts constitute "fraud or deception" under section 22-45 of the Illinois Property Tax Code. 35 ILCS 200/22-10 (West 1996). As part of the tax deed proceedings, the property purchaser is required to give notice of the tax sale and the date until the property can be redeemed to the property owners, occupants and parties interested in the property. 35 ILCS 200/22-10 (West 1996). The property purchaser must demonstrate a diligent inquiry and effort in locating the owner or interested party. 35 ILCS 200/22-15 (West 1996). Also, the property purchaser must strictly comply with the notice provisions in order to receive a tax deed. 35 ILCS 200/22-40 (West 1996).

Tax deeds are incontestable except by appeal from the court's order directing issuance of the tax deed. 35 ILCS 200/22-45 (West 1996). Relief from the issuance of a tax deed may be sought under section 2-1401 of the Code of Civil Procedure, comparable to the relief sought from final orders and judgment in other proceedings. 35 ILCS 200/22-45 (West 1996). Section 22-45 sets forth the grounds for relief pursuant to section 2-1401, which are as follows:

(1) proof that the taxes were paid prior to sale;

(2) proof that the property was exempt from taxation;

(3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Sections 22-10 through 22-30. 35 ILCS 2002/22-45 (West 1996).

Obtaining a tax deed by fraud is sufficient grounds for relief from the issuance of the tax deed. Fraud does not necessarily arise from the failure to make a "more thorough inquiry and a more diligent search . . . in the absence of proof of wrongful intent or a pattern of deception." *Zee v. Levy*, 37 Ill.2d 404, 409, 226 N.E.2d 620, 623 (1967). A diligent inquiry does not require a perfect search, but a "kind of search or investigation which a diligent [person], intent on ascertaining a fact, would usually and ordinarily make." *In re Application of County Collector*, 219 Ill.App.3d 396, 404, 579 N.E.2d 936, 941 (1991) (*Keyway Investments, Inc. v. Minority Enterprise Real Estate Investment Trust*). A tax purchaser must provide notice of the tax deed proceedings during the statutory notice period, but may provide the notice any time during the notice period. *In re Application of County Collector*, 220 Ill.App.3d 933, 939, 581 N.E.2d 367 (1991) (*Ohr v. Travelers Mortgage Services, Inc.*). A tax purchaser must diligently attempt to locate and personally serve the property owner before publishing the notice. *Keyway Investments, Inc.*, 219 Ill.App.3d at 403, 579 N.E.2d at 941.

The trial court's determination regarding the exercise of diligence is reviewed on a manifest weight of the evidence standard. *In re Application of Cook County Collector*, 271 Ill.App.3d 12, 15, 648 N.E.2d 153 (1995) (*CNA Tax Investors v. Associates Finance*). Whether conduct amounts to "fraud or deception" is reviewed on a *de novo* standard. *CNA Tax Investors*, 271 Ill.App.3d at 15, 648 N.E.2d at 153.

The Public Guardian contends that Apex did not exercise reasonable diligence because it failed to investigate Lowe's whereabouts based on the information that the "person is hospitalized." The Public Guardian further contends that Apex's representations that it strictly complied with the notice provisions must be considered deceptive. The Public Guardian argues that constructive fraud and equity principles prohibit Apex from benefitting from its failure to exercise reasonable diligence. The Public Guardian also points to Judge Marjan Staniec's affidavit in which Judge Staniec states that he would not have granted the tax deed application had Apex made him aware that Lowe was hospitalized during the notice-serving and redemption periods.

Apex responds that its investigation of Lowe's whereabouts demonstrated reasonable diligence. Apex argues that it acted with diligence because: it attempted to serve Lowe, "occupant" and Austin; Fred Berke, its agent, observed that the house looked vacant; a neighbor told Berke that no one lived in the house; and it attempted to serve Lowe's past attorney. Apex further contends that a tax purchaser is not required to continually update his search for the property's owner throughout the notice period. See *Ohr*, 220 Ill.App.3d at 939, 581 N.E.2d at 371.

The record amply supports the trial court's findings and Apex's contention that Apex made a diligent inquiry into Lowe's whereabouts. Apex reviewed Lowe's voter

registration card to determine her current address. Apex attempted to personally serve Lowe, "occupant" and Austin with notice on multiple occasions. In addition to attempting to serve notice, Apex's agent personally inspected the property and noticed that there was no furniture in the house after looking through a window. The agent then proceeded to determine Lowe's whereabouts by talking with a neighbor who informed the agent that Lowe owned the house but no one was living in the house. Not only did Apex attempt to personally serve Lowe, "occupant" and Austin, but Apex also attempted to serve the attorneys that prepared the 1993 deed to the property and First National Bank of Chicago, the mortgagee of the property. Moreover, a reasonable individual would not have investigated the notation "person is hospitalized" when receiving that notice after the statutory notice period expired nor would it be concluded that the person was hospitalized due to her mental instability.

Additionally, in light of *Ohr v. Travelers Mortgage Services, Inc.*, we agree with Apex that a tax purchaser is required to serve the property owner with notice during the statutory notice period, but is not required to update the search as of the last day of the notice period. Both the Public Guardian and Apex acknowledge that *Ohr* is factually distinguishable from the instant case. In *Ohr*, the mortgage services company argued that it did not receive notice of the tax deed proceedings even though it recorded its interest in the property prior to the end of the statutory notice period. *Ohr*, 581 N.E.2d at 371, 220 Ill.App.3d at 939.

The court in *Ohr* held that a tax purchaser is obligated to provide notice during the statutory period, which can be done on the first, last or any day during the statutory notice period. *Ohr*, 581 N.E.2d at 371, 220 Ill.App.3d at 939. In the instant case, Apex did not learn that Lowe was hospitalized until after the end of the statutory notice period and after Apex

attempted to personally serve Lowe and provide publication notice in the Chicago Daily Law Bulletin. While we agree that *Ohr* did not involve a mentally incompetent property owner but a mortgage lender and Lowe's interest in the property was known at the beginning of the notice period, the court's rule of law in *Ohr* should not be isolated to cases with facts identical to *Ohr*. Based on *Ohr*, we conclude that Apex's failure to investigate the notation "person is hospitalized" does not demonstrate the lack of a diligent inquiry regarding Lowe's whereabouts. Therefore, we further conclude that the trial court's finding that Apex acted with reasonable diligence in determining Lowe's whereabouts was not against the manifest weight of the evidence.

Moreover, the record of in this case does not support the Public Guardian's contention that Apex's representations to the trial court that it exercised diligence in serving notice in compliance with the statutory requirements constituted fraud for purposes of section 22-45. The trial court did not err in finding that Apex exercised reasonable diligence. A diligent inquiry does not require perfection nor is fraud established if an individual could have made a more thorough inquiry. See *Zeve*, 37 Ill.2d at 409, 226 N.E.2d at 623. Proof by clear and convincing evidence that the tax deed was procured by fraud was not established in this case as required by section 22-45 due to Apex's failure to investigate Lowe's hospitalization. Therefore, the trial court did not err in denying the petition to set aside the tax deed.

Accordingly, for all of the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

GALLAGHER, J., with O'MARA FROSSARD, P.J., and SMITH, J., concurring.

Appendix E

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION, ETC.
v.
PETITION OF APEX TAX INV.

No. 95 CoTD 3812

ORDER

This cause coming on to be heard for ruling after trial on petition of Patrick Murphy as Administrator of the Estate of Mary Lowe (D) to set aside tax deed.

For reasons set forth by the court on the record.

It is hereby ordered that the amended petition to set aside tax deed be and hereby is denied.

It is further ordered that this is a final appealable order and there is no just reason to delay enforcement or appeal here from.

Atty No.	23828	ENTERED
Name	R. Glickman	APR 09 2002
Attorney for	Herndon	
Address	111 W. Washington	ENTER: s/_____
City	Chicago IL 60602	JUDGE EDWARD P.
Telephone	312-236-7888	O'BRIEN - 1653

Appendix F

In the Circuit Court of Cook County, Illinois
County Department - County Division
IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS,
PETITION OF APEX TAX INVESTMENTS, LTD.

No. 95 CoTD 3812

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 9th day of April, A.D. 2002, at 10:10 a.m.

BEFORE: HONORABLE EDWARD P. O'BRIEN

PRESENT:

OFFICE OF THE PUBLIC GUARDIAN OF COOK COUNTY, ILLINOIS,
(69 West Washington Street, Suite 1800,
Chicago, Illinois 60602,
312-603-0800), by:
MS. ATHANASIA LAGOUSAKOS GARGANO,
MR. DANIEL BELKO and
MS. ELFREDA L. AUSTIN,
Assistant Public Guardians, appeared on behalf of the Estate of Mary Lowe;

BALIN & SMITH, PC,
(100 North LaSalle Street, Suite 1111,
Chicago, Illinois 60602,

312-345-1111), by:
MR. JONATHAN L. SMITH,
appeared on behalf of Apex Tax Investments, Inc.;

LAW OFFICES OF RICHARD D. GLICKMAN,
(111 West Washington Street, Suite 1025,
Chicago, Illinois 60602,
312-236-7888), by:
MR. RICHARD D. GLICKMAN,
appeared on behalf of John Herndon.

REPORTED BY: DINA G. VILLIS, CSR, RPR
CSR No. 84-3400

THE COURT: You can enter appearances from the bench. I'll have a decision for you. Everybody can remain seated if you are more comfortable.

MR. GLICKMAN: For the record, Richard Glickman for John Herndon.

MR. SMITH: John Smith on behalf of Apex Tax Investments.

MS. GARGANO: Nancy Lagousakos Gargano from the Public Guardian's Office on behalf of the administrator of the decedent's estate, Mary Lowe.

MS. AUSTIN: Good morning, Your Honor. Elfreda Austin from the Office of the Public Guardian.

MR. BELKO: Good morning, Judge. Daniel Belko on behalf of the Public Guardian.

THE COURT: All right. I thank you.

Again, this is something that -- I want to thank the parties for their continued patience. We did have a hearing a little over a month ago, and I wanted to review the record one more time.

And again, I want to thank the parties for their patience in this matter, recognizing the fact that this case goes back initially to 1995, and I'm the third judge on it.

So again, your patience throughout this proceeding has been appreciated, and I'm sure I can speak for Judge Staniec and also Judge Arnold as to that fact.

We have here today a motion to vacate a tax order for directed tax deed under Section 2-1401 as modified by 2-245, Subsection 3, of the Property Tax Code.

It's also a contention that the statute, as applied in this instance, resulted in the due process violation as a result of Ms. Mary Lowe's mental incapacity during the period 1995 through 1996.

I'd like to first note -- and again, this is by way of background, but it's an important point. Jurisdiction in this case is in rem, and again, citing the authority of Smith versus DRG, Inc., 63 Illinois 2d, 31. The Court's initial jurisdiction over real estate for back taxes is acquired when the Collector applies to that Court for judgment in order for sale.

And in fact, that was done, and I don't believe anybody seriously questions the nature of the jurisdiction here.

However, by way of background, this isn't an in rem as opposed to an in personam proceeding.

And again, notices are sent and published for purposes of satisfying both the Constitution and -- as well as the U.S. and state Constitutions. And those notices are not sent for covering jurisdiction which is accomplished when, as I said before, the judgment and order for sale is issued.

Also by way of background, the law in this state imposes upon a tax deed purchaser seeking a deed requirement to make diligent inquiry.

And again, going into the background of this case, going back to the prove-up proceeding first filed back in 1996, I reviewed the transcript of proceedings. And again, that diligent inquiry was initiated, according to the transcript, on March 18th, 1996.

And the testimony of Mr. Fred Berke, B-e-r-k-e -- and again, that was an ex parte proceeding, but there's nothing unusual about tax deed proceedings being ex parte.

Quite often, in fact, in a vast majority of cases, they are. Due to the statutory framework and, as I said before, in an in rem proceeding, there's nothing improper about that.

Mr. Berke testified that he went to 13250 South Riverdale, which was Mrs. Lowe's residence, and that he looked into a glass living room window, saw no furniture in the living room, knocked on the door. And he also stated that it appeared to him that no one was living there.

Mr. Berke also testified that he went to a neighbor who was not disclosed by name, but again, at the address of 13248 South Riverdale.

He spoke with the neighbor, and the neighbor -- in terms of a description, he said it was a he. So I'm assuming

it's a male, if that's a correct statement, but anyways, the neighbor told Mr. Berke that there was no one living there. However, he did mention the fact that the owners were the Lowes.

Also in the file is an affidavit, as I mentioned before, from a Lawrence Harmon who is the deputy sheriff who was assigned the task of going out and trying to make -- or, basically give personal notice to Mrs. Lowe regarding the tax deed proceeding that was upcoming and also the fact that a take-notice, informing her of what needed to be done to redeem on the property, was issued as well.

I will mention it now and again later, of course, that given Ms. Lowe's capacity, even if she had received that notice, she wouldn't have been able, in all likelihood, to understand or act upon it.

However, the deputy sheriff's affidavit does indicate that he went out on October 26th of 1995. The affidavit indicates that Ms. Lowe was not served.

In addition, we have on the affidavit, when it came to the boxes, the sheriffs typically -- the reason why she was not served, he checked off the box saying that she had moved.

As we all know, there is a space for additional remarks where the sheriff wrote down, "House vacant per neighbors," which again, I assume that that means that he talked to some neighbor, and some neighbor told him that Mr. Berke was told that no one was living in the house presently.

Additional statutory notices in this case were sent out by the Clerk of the Circuit Court as required, as I said, under the statute by certified mail to Mrs. Lowe.

From looking at the envelopes, attempted services were made on November 9th, 1995; November 15th, 1995. And on November 24th, the envelope was remarked as, "Returned and unclaimed." That envelope returned to the Court file, according to the Clerk's stamp, on November 29th of 1995.

I also have, under the statute, sheriff's attempt at certified mail. One attempt was made to Mrs. Lowe in her name. Another was made to "occupant."

Those notices apparently were attempted to be served by some member of the post office, and again, the attempts list November 16th, December 11th and December 18th of 1995 when, again, on that last date, the envelope was marked, "Returned."

And the envelope returned to the court file, according to the Clerk's stamp, on January 2nd of 1996.

Both these envelopes, however, had written on them, "Person is hospitalized." I will return to these mailings later in the discussion.

Final notices, under the statute, are by publication. These were correctly accomplished pursuant to the statute.

I will note in the file in the case that there was also attempts to locate Ms. Lowe by the attorneys who prepared the tax deed presentation -- again, that was Mr. Smith or somebody under his direction and control who attempted or

in fact was successful in serving attorneys by the name of Starks & Boyd who were served on October 26th, 1995.

Their connection with the file was, apparently they were the attorneys who originally prepared the deed by which the property was conveyed to Mrs. Lowe sometime earlier.

Subsection 3 of 2-245 states that a tax deed may be set aside where there is proof by clear and convincing evidence that the deed was procured by fraud or deception.

Now, in this file -- and again, at the prove-up, we have representations made by counsel that all notices under law were given and also that no incompetents appeared to have an interest in the property.

Looking at all the evidence of record in this case presented at the prove-up as well as all the evidence that is in the file and at hearing, I cannot conclude that the deed was procured by fraud and deception.

Additionally, though, even the authority of the Tax Code has been found unconstitutional by the Supreme Court, and I believe it is one of many of the Roseweld decisions.

It's also clear that the statute, as applied, can result in a due process violation where a person with an interest in the property is mentally incompetent and the tax deed petitioner either knew or reasonably should have know that disability.

The lead case on this case is the County Collector versus Otsus. That's 188 Ill. App. 3d, 1068. That's a 1989 case written by Justice Scariano, which again was interpreting an earlier United States Supreme Court case

dealing with this aspect of the law and the due process context dealing with people who have mental incapacities.

During the hearing last month, we had the testimony of Dr. Rubin who I believe is an eminent psychiatrist and has testified before before me where Dr. Rubin came to the conclusion that Mrs. Lowe suffered from chronic schizophrenia from the period beginning approximately in January of 1995 to well into 1996.

Moreover, Dr. Rubin testified that Mrs. Lowe was a resident at the Tinley Park Mental Hospital from July 1995 through December of '96, at which time she was taken by a son to live with her in California. And as we all know, Mrs. Lowe later passed away in the state of California.

Dr. Rubin's diagnosis, which I believe is certainly a correct one, was accomplished from an after-the-fact review of Mrs. Lowe's medical records.

As all the parties are aware, these records were obtained by Court order and, in fact, they can only be obtained by Court order. These medical records are generally not publicly available.

And, more importantly, psychiatric treatments records are stringently protected under Illinois law from disclosure. That is done, in my mind certainly, for a laudable legislative purpose. And that's so that people can return to their lives without being stigmatized based upon either a past psychiatric illness or even a present or treatable psychiatric illness.

Under the Otsus case, as stated by Justice Scariano, the appropriate standard of proof, as I'm going to assess it, is not like under Section 22, Subsection 3, which is a clear and

convincing standard but, again, evaluates a civil case in a due process context.

And I believe that the appropriate standard of proof that I should use here is one of preponderance of the evidence.

And again, the inquiry, as I've stated before, is with regards to what was known or reasonably should have been known by the petitioner and people affiliated with the petitioner in this case.

Now, as I said before, due to the testimony of Ms. Hightower, we now know that the person who wrote "Person is hospitalized" on the sheriff's certified mail envelope was Ms. Hightower and that she was a regular U.S. mail carrier in that area.

Ms. Hightower testified before this Court as to how she could have been found using the postal system's identification of carriers based on information on the certified mail envelope.

Ms. Hightower also testified that she knew Mrs. Lowe suffered from a mental illness and that she was, at the operative time, at Tinley Park Mental Health Hospital.

However, when it comes to looking at the actual envelope and the notation that Ms. Hightower did make on it, as we all know, she wrote down, "Person is hospitalized."

She didn't write anything more on the envelope at that time quite possibly for the same reason that neighbors told Mr. Berke and also Deputy Harmon that the persons living at 13250 South Riverdale had moved.

And again, this is a conclusion that obviously, if Ms. Hightower knew, based on the erratic behavior of Mrs. Lowe, that -- and she went into some detail that Mrs. Lowe suffered from a mental illness -- I can't avoid the conclusion that certainly neighbors wouldn't have known that fact as well.

However, looking at the language here, again under the applicable standard of proof and again looking at the inquiry, which is what a person either knew or reasonably should have known, I can't come to the conclusion that because a person is held to be aware of a fact that someone else is hospitalized, as was written on the envelope, that that is reason why somebody reviewing that should basically automatically assume that that hospitalization means that it is subject to mental illness.

And the simple fact of the matter is that there are just too many reasons, as we all know, why as person may be in fact hospitalized which don't prevent them from managing their personal affairs. That's a routine fact of life.

And again, before I came to this division, I in fact did mental health cases. In my own view, I think the fact that -- in terms of likelihood, I didn't think I would have concluded that the simple fact that somebody is hospitalized means that, in all likelihood, it's for psychological reasons or that they lack capacity to run their own life. Although, in Mrs. Lowe's case, obviously that was the fact.

So based on -- again, based on the facts presented in this case, I don't believe that the fact that someone may have been hospitalized, according to Ms. Hightower's notation, should lead one to conclude that the reason for that is basically based upon mental illness or anybody reading that should have known or either knew or reasonably should have

known that in fact the reason for the hospitalization was in fact mental incapacity.

As I said before, the parties are aware that there is an indemnity fund in this case that may allow for Mrs. Lowe's estate to recover the value of her home at the time the tax deed was issued.

And as I said before, certainly -- and I'll say it again -- I urge the attorneys in this case to do so on behalf of the estate.

However, in a case like this one, where someone is divested from their home, I don't believe that financial representations -- or, reparations -- excuse me -- adequately compensate the type of asset loss when in fact that asset is a home.

As I mentioned before as well, psychiatric admissions and also related treatment information is zealously protected from public access under the statutes.

And I think that is for a good reason, as I've mentioned before. However, in the -- in this particular case, the protection of that information actually worked to the serious detriment of Mrs. Lowe. I think that's obvious.

Again, Dr. Rubin testified from the records that at many times, Tinley Park personnel thought about actually having a guardian appointed to represent Mrs. Lowe's estate, but unfortunately -- while she was living there, but unfortunately, that didn't happen.

In theory, when she was at Tinley Park, had a guardian been appointed, then arguably taxes could have been paid, and the property could not have been lost.

Too often, though, either a guardian is not appointed or appointed too late to pay taxes before taxes actually became due, and I don't mean this to be critical of the hospitals.

They have a very difficult job in evaluating family situations, basically, if there are family members that are willing to take responsibility for a person's affairs when they are held in a mental health facility and also the entire -- the idea about choosing a guardian.

It seems to me -- I've mentioned this before. Although this would take some legislative initiative, there could be at least a procedure developed in cases like that where somebody feels that there is a situation where either a guardian cannot be immediately appointed or for other reasons where actually formal guardianship is not appropriate, that the legislature could act to allow medical health personnel to basically file a certificate under seal, asking that the County Collector to forego the basic corrector remedies, including selling property for tax certificates.

This would allow, again, the property to be kept off the record until somebody either returns to good mental health or a guardian is appointed who can take control of somebody's affairs.

It seems like a short form procedure that could be accomplished, again, without invading anyone's privacy rights because I mentioned the fact that this would be something under seal and would not set in motion an entire sequence of events which began in this case, again going back to 1995 and is only concluding today.

This is my best thinking on the matter. And again, as I said before, I thank all the parties for their patience that

they've exercised throughout this long and somewhat arduous case.

So again, for the reasons that I've stated here today, I'd ask counsel to draft an order saying that the motion to vacate the order for tax deed will be denied for the reasons stated in the transcript of proceedings.

So, thank you, everyone.

MR. GLICKMAN: Thank you, Your Honor.

MR. BELKO: Judge, we would like to ask just for a stay.

I don't know if Your Honor wanted to hear that orally or a written motion.

THE COURT: For what now?

MR. BELKO: For a stay, Judge.

THE COURT: What is it that you seek to stay?

MR. BELKO: We seek to stay the judgment that was entered issuing the tax deed.

We intend to appeal this case, and we wouldn't want petitioner to convey, you know, deed to the property.

So we'd like to preserve that and proceed that way. I don't know if Your Honor wants a written motion.

THE COURT: I'll tell you what.

At this point -- and again, I don't know what anybody's thinking is. At this point, certainly if anything in the way of a change in possession, actual possession of the

property is being contemplated, a stay would be appropriate, but in terms of -- I would say today, in terms of actually anticipating doing something in terms of a transfer, since this was a public case -- and again, it's noted for the record -- I would think that anybody who would seek to accomplish a transfer, knowing the fact that you're indicating that you wish to appeal, would do so at their peril.

Certainly, I don't think anybody acquiring title subsequent can claim that they are entitled to bona fide purchaser status.

So again, if you want to file a motion for a stay within the next 30 days, certainly with a motion for rehearing, you can do that, but --

MR. BELKO: Okay, Judge.

THE COURT: -- at this point, again, Mr. Glickman, as of today, your client is entitled.

Is your client intending to do anything other than the status quo that would necessitate me hearing an emergency motion for a stay?

MR. GLICKMAN: Nothing that I have knowledge of, Judge.

THE COURT: Okay. In fact, in order to avoid a hearing on that, will you inform your client if in fact they anticipate doing something like that, to please let you know so that they can let counsel know so, again, they can consider whether or not a stay is appropriate or whether or not they should seek a stay?

Will you do that?

MR. GLICKMAN: No.

THE COURT: You will not?

MR. GLICKMAN: No.

THE COURT: All right. Well, then, we'll take a hearing.

MR. GLICKMAN: If he wants to file a motion, that's fine, but I can't tell my client what they can or can't do.

The answer is simply that we're within 30 days of the order. It's not a final order.

THE COURT: That's sufficient.

MS. GARGANO: Judge, I think that Mr. Glickman isn't -- you're not instructing Mr. Glickman to instruct his client to do anything.

Just if his client intends to sell it, that he just notify us.

THE COURT: That's what I'm asking, and Mr. Glickman is saying that he won't do that.

MR. GLICKMAN: I have never represented Mr. Herndon before, Judge. I know that he owns more than one property, Your Honor.

I don't know how I can make such a representation to the Court. If the Court instructs me, I will do anything the Court instructs me to do, but voluntarily. I think it's not permitted. It's beyond the scope of my --

MS. GARGANO: Judge, when can you hear that? Since we have all of the parties here, we can pick a date.

THE COURT: Well, let me ask the parties a different way. I'll take one final stab at it.

Your involvement is essentially over, unless you've got some subsequent client.

Mr. Glickman, do you have a motion for stay under an order for 30 days?

MR. GLICKMAN: Do I want a hearing? There's no motion even pending.

THE COURT: Do you wish a hearing on a motion?

MR. GLICKMAN: If they file something, I'll deal with it when they file it, but I thought motions have to be filed. I don't even know what they're filing and why they're standing here.

MS. GARGANO: We intend to file it, Judge.

THE COURT: Please.

MS. GARGANO: We'd like to just, out of courtesy for everyone's schedule, select a date right now so that we all could be on the same page. That's all.

THE COURT: That's all I'm proposing.

All right. So we'll do -- at this point, again, why don't we get a -- we can set a hearing date on it, but I don't think there's anything you're going to need to file, other than the fact of what you've already requested, basically.

MS. GARGANO: Judge, we'll file it today.

MR. BELKO: We'll file our motion today, Judge.

THE COURT: Okay.

MS. GARGANO: We'll drop off a courtesy copy and send a copy to Mr. Glickman.

If we can have a date sometime in the next two weeks, that would be --

THE COURT: Yeah. And again, like I say, at this point, for anybody subsequently, certainly, who is attempting to acquire title of this property or someone is attempting the lease, I think your statement on the record today in this case -- although I'm not going to issue a stay today and although I might very well at the next date -- should serve as notice to anybody who wishes to have an interest in this property that in fact the matter is being litigated.

And, in all likelihood, your office will file an appeal on this case. For what it's worth, that will be noted. All right.

MR. BETLKO: Thank you, Judge.

THE COURT: Thank you.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

Appendix G

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION
OF THE COUNTY COLLECTOR, ETC.
v.
PETITION OF APEX TAX INV.
PETITIONER

ORDER

No. 95 CoTD 3812

This cause coming on to be heard on motion for summary judgment of Mary Lowe against Apex Tax Investment.

All parties and this Honorable Court being fully advised.

It Is Hereby Ordered that

1) The motion for Summary Judgment of Mary Lowe be and hereby is denied;

2) Apex and Herndon are given 21 days to file answer to amended 2-1401 Petition of Lowe.

3) That this matter is set for status for the purpose of setting trial date on March 23, 2000 at 11:00 A.M.

Atty No.	23828
Name	R. Glickman
Attorney for	Herndon
Address	111 W. Washington - 1125
City	Chicago IL 60602
Telephone	312-236-7888

ENTERED
FEB 16 2000

ENTER: s/_____
JUDGE NANCY
ARNOLD No. 10
0436

Appendix H

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR, ETC. APEX TAX INVESTMENTS, INC., Petitioner,

v.

MARY LOUISE LOWE, Respondent.

No. 95 CoTD 3812

MEMORANDUM DECISION

This matter comes on for a hearing on two motions for summary judgment – one, by Mary Lowe, whose property was subjected to a tax sale for nonpayment of 1991 real estate taxes and – the other motion, by John Herndon, allegedly the "bona fide purchaser for value" of the subject property, who is the contract purchaser from Apex Tax Investments, Inc., for $10,000. payable in two installments, with the final $5,000. to be payable on March 31, 1999. Herndon was to receive the deed to the property after final payment was made to Apex. Herndon's purchase contract is dated December 6, 1996.

BACKGROUND

Mary Lowe lost her property for nonpayment of 1991 real estate taxes to Apex Tax Investments, Inc. Taxes were sold to Apex on March 3, 1993. Property was not redeemed. Tax deed prove-up proceedings were held on March 18, 1996 and tax deed was later issued to Apex Tax Investments Inc.

During the prove-up, witness Fred Burke testified that he inspected the property during the notice serving period, being September 21, 1995 to November 21, 1995, as required by statute. That he found no one was living there and that upon speaking with a next door neighbor, at 13248 S. Riverdale, he was advised that no one was living there and that the owner of the property was Mary Lowe. Personal service of notice of the sale and expiration of redemption period was made on all parties that could be found, pursuant to the Property Tax Code.

The County Clerk was personally served notice on October 25, 1995 and attorneys Starks & Boyd, P.C., were served, since they prepared the deed to Mary Lowe when she purchased the property.

Representation was made to the court, that since property was vacant and whereabouts of title owners Mary Lowe and William Austin could not be located even with diligent search, mail notices were sent by Apex to preparers of the deed for Mary Lowe and William Austin, on assumption the law firm might know the whereabouts of the title owners. And mortgagee First National Bank of Chicago was served notice on October 24, 1995.

All other requirements of the Property Tax Code regarding notices and due diligence was represented as being in full compliance.

This matter was then taken under advisement until the court received proof of payment of subsequent year taxes, transcript of the prove-up proceedings and an appropriate order of the court to enter. On May 13, 1996, petitioner presented the necessary documents and proofs, along with a proposed order for the issuance of a tax deed to Apex Properties.

We note that the sheriff's two attempted mail service of notice on Mary Lowe was unsuccessful; mail envelopes were returned with post office notation that "person is hospitalized."

On September 5, 1997, Mario John Lowe, son of Mary Lowe, filed a pro se petition for "Restoration of Property Ownership". Another son, Bruce Edward Lowe was the author of the petition.

The pro se petition alleges that Mary Lowe was released from Tinley Park Mental Health facility to the care and custody of her son Bruce Edward Lowe, who resides at Moreno Valley, California and that Mary Lowe was hospitalized at Tinley Park since August 26, 1995. That his mother Mary Lowe has been in and out of various mental health facilities for the past 30 years of her life. He alleges that through his brother Mario, in direct and phone contacts from January 5, 1997 through April 30, 1997 they were unable to ascertain status of their mother's property.

On May 15, 1997, Mario and Bruce allegedly were advised by Cook County Tax Assessor's Office, "to pay back delinquent property taxes in the sum of $1,457.00 "to have the property promptly restored to Mary Lowe's ownership." That on May 13, 1997, he received a copy of the court's prior judgment and orders, and that the $1,457 amount had been applied to the owner's tax debt.

Pro se petitioner Bruce Lowe argues that "personal service on a person of incompetent standing violates the individual's due process."

Tax purchaser Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it had

exercised due diligence in reviewing the court file before prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would have noted the Post Office notation on the return envelope – and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by Property Tax Code.

The issue is patently obvious, without the necessity of more specific fact allegation, that Apex asserts is required in the pleadings in Illinois – a fact pleading State – that a mental patient who was hospitalized for mental illness, known to many of her neighbors to be mentally ill, that she would be unlikely to understand the legal significance of such notice, even if she were to receive it, which she did not. (Mentally ill persons are no longer adjudicated incompetent in Illinois since about 1970.) As a matter of fact, institutionalized persons who were previously adjudicated "incompetent" when found "subject to involuntary hospitalization", were in 1970's and later declared as restored to competency by the amended act. Persons, who are hospitalized for mental illness, can be voluntarily patients (not requiring adjudication) or involuntary patients (requiring judicial commitment).

According to son, Bruce Lowe's affidavit, Mary Lowe's hospital records indicate that she was hospitalized for mental illness during the following times:

2-7-64/5-11-64...3-11-65/3-17-65...3-18-65/5-10-66...2-25-75/3-6-75...12-26-75/12-30-75...1-5-76/1-30-76...5-16-78/5-25-78...7-7-78/7-16-78...4-7-79/4-26-79...11-7-79/11-17-79...11-13-87/11-18-87...4-17-89/5-10-89...11-22-89/12-8-89...1-2-90/1-5-90...4-17-91/4-18-91...1-4-93/1-5-91...1-4-93/1-5-93...1-4-95/1-9-95...and from 11-95 to 12-17-96.

She had 20 hospitalizations since February 1964 to December 1996. In November of 1995 when Apex sent notice to Lowe she was at Tinley Park Mental Health Facility.

Post Office letter carrier's affidavit indicates he has had contact with Mary Lowe on a daily basis in 1994 and 1995. Retired Post Office employee lives across street from Lowe's children and Mary Lowe.

On or about December 9, 1996, Herndon entered into an executory installment contract with Apex, for the purchase of the subject property for $10,000. He was required to make two installment payments, with a final payment of $5,000 installment on March 31, 1999 to Apex. He was to receive no deed to the property, until he made the final payment and closing took place.

In accordance with *Daniels v. Anderson*, (162 Ill. 2d 47), Herndon is not a bona fide purchaser, since he had actual knowledge of Mary Lowe's interest in the subject property since at least August 1998, which was several months before he would acquire title to the property by terms of the contract of December 19, 1996.

Apex argues that Herndon's notice of Mary Lowe's interest was insufficient to negate Herndon's status as a bona fide purchaser under the theory of equitable conversation, and cites *Shay v. Penrose*, 25 Ill. 2d 447, as authority for the applicability of equitable conversion theory. The constructive or actual knowledge Apex had of Mary Lowe's interest in the subject property, we believe should be imputed to Herndon. We hold that the equitable conversion theory is not applicable and that Herndon at his own risk undertook to purchase and to rehab the property.

We reject that Herndon is a bona fide purchaser-for-value. No genuine issue of fact exists.

Summary judgment is granted to Mary Lowe. Summary judgment is denied Herndon. This court maintains jurisdiction of the subject matter and parties until other issues pending are resolved.

ENTER: JUDGE MARJAN P. STANIEC
s/_____JUN 08 1999
CIRCUIT COURT - 433

Appendix I

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS,
PETITION OF APEX TAX INVESTMENTS, LTD.

NO. 95 CoTD 3812

ORDER DIRECTING ISSUANCE OF TAX DEED

This matter coming on to be heard upon the verified Petition and Application of for an order on said Petition that a Tax Deed issue, and upon proofs and exhibits heard and offered in open court; and the court having heard the statements of the witness and the arguments of counsel and having been fully advised in the premises, FINDS:

1. That it has jurisdiction of the subject matter hereof and of all parties hereto.

2. That the tax sale Notices, copies of which are attached to and made a part of the said Application and Affidavit filed herein, were served in the manner and within the time required by Section 263 and 266 of the Revenue Act of 1939, as amended, upon the persons entitled to such notice.

3. That the persons entitled thereto have had due notice of the filing and the time of hearing upon this petition herein.

4. That the real estate hereinafter described has not been redeemed from the sale of March 3, 1993, pursuant to the judgment for sale as provided by Chapter 120 of the Revenue Act, and that the time for such redemption expired on February 21, 1996.

5. That all general taxes and special assessments which have become due and payable subsequent to said sale have been paid and all forfeitures and sales which occurred subsequent thereto have been redeemed.

6. That all material allegations of said petition are true; that Petitioner has fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto, and is therefore entitled to a deed of conveyance vesting in Petitioner the title in fee simple to the hereinafter described real estate and every part thereof.

IT IS THEREFORE ORDERED that DAVID D. ORR, County Clerk of said Cook County, do forthwith make, execute and deliver to said Petitioner upon the surrender to said County Clerk of the Certificate of Purchase delivered to the original purchaser, a good and sufficient deed conveying to said petitioner all of the following real estate, to wit:

> Lot 9 (except the Northerly 25.1 feet thereof) in Block 8 in Golden Gate Subdivision being a Subdivision of part of the East 1/2 of the Northwest 1/4 of Section 34, Township 37 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

Permanent Index Number: 25-34-113-034-0000

IT IS FURTHER ORDERED that this Court reserves jurisdiction of this cause for the purpose of issuing any Orders of Possession to place and maintain said Petitioner in possession of said real estate as may be necessary or desirable, and further, this Court expressly finds, pursuant to Supreme Court Rule 304(a), that there is no just reason for delaying the enforcement of this Order or the appeal therefrom.

s/_____
Marjan P. Staniec 0433

.....
JUDGE JUDGE'S NO.

ENTERED MAY 20, 1996

BALIN, SMITH AND ASSOCIATES, LTD.
Attorneys for Petitioner
100 N. LaSalle, Suite 1111
Chicago, IL 60602
(312) 345-1111
Firm No. 30179

Appendix J

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES FOR THE YEAR 1991 AND PRIOR YEARS.
PETITION OF APEX PROPERTIES

Case No. 95 CoTD 3812
Certificate No. 91-0013384

REPORT OF PROCEEDINGS had in the above-entitled matter, before the HONORABLE MARJAN PETER STANIEC, Judge of said Court, on Monday, March 18, 1996, at 11:00 a.m.

APPEARANCES:
MR. JONATHAN L. SMITH,
appeared on behalf of the Petitioner
WITNESS:
MR. FRED BERKE

THE CLERK: 95 CoTD 3812, Apex Tax Investments.

MR. SMITH: Morning, Your Honor. For the record, Jonathan Smith on behalf of the Petitioner.

I have a witness present. Would like to have him sworn.

(Witness sworn)

Your Honor, this petition for tax deed arises out of the 1991 annual tax sale for the property identified by permanent index number 25-34-113-034. The original certificate of purchase number 91-13384 was sold and issued to Apex Tax Investment on March 3, 1993.

I offer into evidence the original certificate of purchase, ask it be admitted into evidence and leave be granted to withdraw the original, substituting a photocopy attached to the petition for tax deed.

THE COURT: The original admitted into evidence, substitution allowed with a photocopy for the court file. Original is being returned to counsel.

The Court notes there's been no assignment to any other party.

MR. SMITH: Right, Your Honor. Your Honor, the redemption date for this sale expired on February 21, 1996. Subsequent to that date, we checked the Cook County Clerk's judgment book and determined that no redemption had been made.

In order to determine interested parties in this matter, we ordered a printout tract search, examined the documents referred to therein, and caused the subject property to be inspected.

FRED BERKE,

called by the Petitioner, having been first duly sworn, was examined and testified as follows:

EXAMINATION

By Mr. Smith:

Q At this time I call Mr. Fred Berke and ask if you've had an occasion could to inspect the subject property?

A Yes, I did.

THE COURT: He was sworn.

A Yes.

MR. SMITH: Q What did you determine the common street address of the property to be?

A 13250 South Riverdale.

Q And what was the property improved with?

A It was sort of a split level connected townhouse made of like brick and frame sided.

Q Single family residential?

A Yes.

Q And were you able to determine anything about the occupancy of the property at that time?

A Yes. I went to the door. I was able to look inside the glass living room window there. And I noticed there was no furniture in there. And knocked on the door and appeared to be no one living there.

And I spoke to the neighbor next door at 13248. And he says that no one was living there, and the owner was--the owner is the Lowes.

MR. SMITH: Your Honor, through Mr. Berke's inspection and our examination of the public records, we were able to make a list of interested parties. That list is contained on the sheriff's rider to the sheriff's take notice.

At this time I call your attention to the affidavit in support of the application wherein the parties served, the manner they were served, and date they were served is set forth. Also indicate for the record the interest those parties have or may have had in the subject property.

Under Personal Service we list David D. Orr, County Clerk, served pursuant to the Property Tax Code which requires service on the County Clerk. That was on October 25, 1995.

Starks & Boyd, P.C. was served October 26, 1995. Your Honor, the reason they were served is that they were the attorneys who prepared the deed that deeded the property from Mary Lowe to Mary Lowe and William Austin together.

We were unable to develop any address for William Austin and Mary Lowe other than the subject property address. And we knew that property to be vacant. So in attempting to be diligent in ascertaining the whereabouts of these people, giving notice to them the taxes were delinquent, we sent the notices to Starks & Boyd, which we assumed to be the attorneys for Mary Lowe, because Mary Lowe and William Austin were the only parties which were a party to that deed.

Showing to the Court a copy of that deed which conveyed the property from Mary Lowe individually to Mary Lowe and William Austin, which shows the deed was prepared by Starks & Boyd, P.C.

THE COURT: Very well. Admitted into evidence and substitution allowed with a photocopy for the court file at the time you provide a transcript.

MR. SMITH: Thank you, Your Honor.

The First National Bank of Chicago was served in their capacity as mortgagee on October 24, 1995.

There was no one served by substitute service.

And the sheriff of Cook County after attempting personal service sent certified mail to the Occupant, 13250 South Riverdale on November 7, 1995.

William Austin, who was one of the co-owners, at 13250 South Riverdale on November 7, 1995.

Mary Lowe, which was one of the owners with William Austin, also at 13250 South Riverdale, on November 7, 1995. The voters registration polling sheet for this property indicates that Mary Lowe is a registered voter at 13250 South Riverdale. She's also one of the owners of the property.

Your Honor, at this time I offer into evidence the sheriff's take notice, the rider to the sheriff's take notice, the green return receipt cards and envelopes generated by the mailings, the clerk's certificate of mailing, the clerk's take notice, and the rider to the clerk's take notice, along with the

sheriff's returns of service, all of which are contained within the court file, and ask those be admitted into evidence.

THE COURT: Admitted into evidence.

MR. SMITH: Your Honor, notice of these proceedings was published in the Chicago Daily Law Bulletin on October 11, 12, and 13, 1995, the same notice appearing on the sheriff's take notice and then list of interested parties along with the words "unknown owners or parties interested in said property".

I offer into evidence the original certificate of publication, and ask it be admitted into evidence and leave be granted to withdraw the original, substituting the photocopy attached to the affidavit.

MR. SMITH: Q Mr. Berke, was there a notice prepared pursuant to former Section 241(A) of the Revenue Act?

A Yes.

Q Was that directed to the County Clerk within five months of the purchase of the certificate?

A Yes.

Q And do we have that available to us this morning?

A No. I don't have that with me.

Q Do you have the original and will you be able to provide that to the Court?

A Yes, I will.

MR. SMITH: Your Honor, we ask leave be granted to provide the Court with the original with the green stamp on it at the time the transcript and proposed order are presented to this Court.

THE COURT: Leave granted.

MR. SMITH: The property is not registered in Torrens.

There are no minors, incompenents, or estates that appear to have an interest in the property.

And we do not have proof of payment of all subsequent years taxes, although the 1992 taxes were paid and posted to the tax sale judgment book. We'll provide that proof along with the other subsequent years at the time the transcript, proposed order, and other documentation are presented to this Court.

THE COURT: Very well. Leave granted. And what are the diligent efforts you made to try to locate the whereabouts of Mary Lowe and William Austin, Sr?

MR. SMITH: We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys, Starks & Boyd.

We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

THE COURT: Very well. All right. The Court will make a finding the period of redemption expired, no redemption has been made. Due diligence has been

exercised by counsel and the Petitioner in ascertaining parties who had either ownership or other interest in the premises. Due diligence in the inquiry as to whereabouts of parties who had rights to be notified pursuant to Section 214(A), 263 and 266 has been complied with.

The matter will be taken under advisement, continued generally until such time as the transcript, proof of payment of subsequent years taxes, and the appropriate order for the Court to enter, and submission of the original copies of the documents referred to in the transcript.

So ordered and continued generally.

No. 07-56

In The
Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,

Petitioner,

v.

APEX TAX INVESTMENTS, INC.
AND JOHN HERNDON,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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**Counsel of Record*

Attorneys for John Herndon

QUESTION PRESENTED

1. Whether, before real property is taken from its owner in a two-step delinquent tax sale proceeding, the person charged with giving notice is required by the Due Process Clause of the Fourteenth Amendment to take continual and additional steps to locate the property owner, above and beyond the multiple notices statutorily mandated during both steps of the delinquent tax sale proceeding, after mailed notice sent in compliance with the second step of the tax proceeding has been returned undelivered and bearing notations regarding "hospitalization"?

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RESPONDENT'S OBJECTION TO PETITIONER'S PRESENTATION OF QUESTIONS FOR REVIEW

The Public Guardian presents three questions for this Court to consider on review:

> 1. Whether the Due Process Clause requires that a homeowner be provided with notice of the judicial proceeding at which the title to her home, and all of her property interest in it will be extinguished once and for all?
>
> 2. Whether the party responsible for providing a homeowner with constitutionally sufficient notice is free to ignore an undelivered, returned notice, which either reveals the homeowner's actual whereabouts or contains information that is reasonably likely to lead to the discovery of her whereabouts, simply because the party took some reasonable steps to provide the homeowner with actual notice before the new information came to its attention?
>
> 3. Whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may constitutionally foreclose a homeowner who did not receive actual notice of the proceeding from challenging, on federal constitutional grounds, the sufficiency of the efforts made to discover her whereabouts?

The Public Guardian's questions are improper in that they misconstrue and misstate the issue for review.

More specifically, the first two questions each fail to properly address the issue for review because they are narrow in scope and do not encompass all the relevant facts to be presented in this case – i.e., that the "judicial proceeding" referenced in the first question is the second

step in a two-step tax sale process, that the "undelivered, returned notice" referenced in the second question is one of a number of notices required by statute as part of step two in the tax sale process, and that the "reasonable steps" referenced in the second question are actual multiple notices required by statute in step one of the tax sale process. Thus, the Public Guardian's failure to encompass this case's two-step statutory tax sale proceeding into its questions misdirects this Court on the issue for review.

As to the Public Guardian's third question, it too clearly is improper. This question, as presented, would lead one to assume that this case involves a judicial holding that prohibited the Public Guardian from disputing the adequacy of notices sent to the property owner on constitutional grounds. This is absurd since the Public Guardian fails to even point out any judicial language from the Illinois state courts that hold that state law precluded the Pubic Guardian from raising its Due Process claim.

In summary, the Public Guardian's questions are improper and fail to address the real issue for review. At issue for review, is the constitutional adequacy of the notice sent by Apex under the two-step process mandated by Illinois law, and whether the mailed notice that was returned undelivered in step two of the process necessitated Apex to take additional steps to locate the homeowner of the property that Apex had acquired during a delinquent tax sale proceeding. Thus, the question to be presented for review must reflect this factual scenario.

ARGUMENT

The granting of judicial review on a petition for writ of certiorari is discretionary with the U.S. Supreme Court. According to Rule 10 of the U.S. Supreme Court Rule, said review may be granted upon a showing of "compelling reasons." The Public Guardian does not provide any compelling reason to substantiate granting certiorari. Therefore, the petition for writ of certiorari filed by the Cook County Public Guardian (the "Public Guardian") in this instance should be denied.

As indicated in the Public Guardian's statement of facts, this is its second petition for writ of certiorari in this case. After the Illinois Supreme Court rendered a decision on October 20, 2005, that ruled against the Public Guardian, the Public Guardian filed its first petition for writ of certiorari. The petition was granted by this Court and remanded to the Illinois Supreme Court for reconsideration in light of the recent U.S. Supreme Court decision in *Jones v. Flowers*, 547 U.S. 220 (2006). On April 19, 2007, the Illinois Supreme Court on remand affirmed its previous decision. This second petition was filed thereafter.

The Public Guardian's disagreement with the Illinois Supreme Court's April 19, 2007 decision, based on its application and interpretation of the *Jones v. Flowers* decision, is not a compelling reason to grant the petition. The Public Guardian argues that it was judicial error for the Illinois Supreme Court to hold that the *Jones v. Flowers* case is distinguishable from the Public Guardian's case. The Illiñois Supreme Court distinguished the *Jones v. Flowers* decision from the case before it on the basis that the *Jones v. Flowers* case addressed a one-step, single

notice Arkansas delinquent real estate tax sale statute that was significantly different from the two-step, multi-notice Illinois tax sale statute. Yet, the Pubic Guardian in its petition acknowledges that the Arkansas statute and Illinois statute are very dissimilar. The Public Guardian, however, would have this Court ignore the dissimilarity and focus only on the second half of the Illinois two-step process because the actual taking does not occur until after step two, the judicial proceeding, has been completed.

This argument by the Public Guardian is illogical given that the judicial proceeding under the Illinois statute cannot occur until after step one, the administrative tax sale, has been competed. In other words, the actual taking under Illinois law occurs after both steps have properly been completed by the tax sale purchaser; it does not occur in isolation after the judicial proceeding. Thus, the Public Guardian's argument must fail because the *Jones v. Flowers* decision which addresses a case questioning a single notice in a one step process is clearly distinguishable from a case in which there are multiple notices sent in both steps of two-step process.

Furthermore, the Public Guardian's petition should be denied because in its April 19, 2007 decision the Illinois Supreme Court explicitly stated that even though it held that the *Jones v. Flowers* case was distinguishable, the Illinois Supreme Court did consider that case's ruling and applied it to the Public Guardian's case. In doing so, the Illinois Supreme Court also ruled that its decision to reaffirm its October 20, 2005 decision was consistent with the U.S. Supreme Court's decision in *Jones v. Flowers*. Indeed, the Illinois Court went on to state that the steps taken by Apex in the instant case to comply with due

process requirements exceeded those suggested by the U.S. Supreme Court in the *Jones v. Flowers* decision.

The Public Guardian's argument that the Illinois Supreme Court on remand failed to properly apply and interpret this Court's holding in the *Jones v. Flowers* case does not merit a granting of certiorari. The question of what notice is required in tax sale proceedings in order to comply with the Due Process Clause has been answered by this Court on numerous occasions, and most recently in the *Jones v. Flowers* decision. Thus, the real issue that the Public Guardian raises in its petition is whether the Illinois Supreme Court properly considered the *Jones v. Flowers* decision on remand. A review of the Illinois Supreme Court's April 19, 2007 decision should lead to an affirmative answer. The Public Guardian's disagreement with the Illinois Supreme Court's application and interpretation of the *Jones v. Flowers* decision in affirming its October 20, 2005 decision is not a compelling reason for review of this case.

CONCLUSION

The Public Guardian's Petition For Writ Of Certiorari and all other relief should be denied.

Respectfully submitted,

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MOTION FILED
AUG 9 - 2007

No. 07-56

In the Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,
Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE and BRIEF *AMICUS CURIAE* ON BEHALF OF MENTAL HEALTH AMERICA AND THE MENTAL HEALTH PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL EDWIN F. MANDEL LEGAL AID CLINIC IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY THE ESTATE OF MARY LOWE

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In the Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,
Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

Motion for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari by the Estate of Mary Lowe

Amici, the Mental Health America (MHA) and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic (Mental Health Project) file this motion for leave to file a brief *amicus curiae* in support of the petition for certiorari. Consent was requested from counsel for all parties. Consent was obtained from Mr. Barry Sullivan, counsel for the Petitioner, the Estate of Mary Lowe, and is attached. As of the date of the filing of this motion, Ms. Denise Brewer, counsel for the Respondent, John Herndon, had not

provided consent.[1] Amici state the following reasons in support of this motion:

1. The legal rule at issue in the case at bar has the potential to affect the lives of persons with mental illnesses across the United States.

2. MHA and the Mental Health Project are uniquely situated to inform the Court regarding the impact this case is likely to have on the lives of persons with mental illnesses.

3. MHA is comprised of mental health professionals, current and former consumers of mental health services, their family members, and concerned citizens. MHA is a primary source of referral and educational material for a wide variety of people, from family members to mental health professionals and legislators.

4. The Mental Health Project has provided legal counsel to persons with mental illnesses for over twenty-five years and seeks to improve the law as it relates to persons with mental illnesses. It also seeks to improve the treatment of persons with mental illnesses, both inside and outside mental health facilities.

5. With its broad experience in the field of mental health law, Amici will explain to the Court how this case will adversely affect individuals with mental illnesses.

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[1] Apex Tax Investments, though named in the case, did not appear in the Supreme Court of Illinois.

WHEREFORE, Amici respectfully request that the Court allow this brief *amicus curiae* to be filed in support of the petition for certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

I hereby grant my consent to **Mental Health America and the Mental Health Project at the University of Chicago Mandel Legal Aid Clinic** to submit an *amicus curiae* brief in the Petition for a Writ of Certiorari to the Supreme Court of Illinois in the case of:

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS, COOK COUNTY PUBLIC GUARDIAN AND SUPERVISED ADMINISTRATOR,

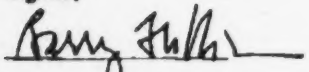
Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,

Respondents.

Signed,



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No. 07-56

In the Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
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Petitioner,

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APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* ON BEHALF OF MENTAL HEALTH AMERICA AND THE MENTAL HEALTH PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL EDWIN F. MANDEL LEGAL AID CLINIC

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY THE ESTATE OF MARY LOWE

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President's New Freedom Commission on Mental Health, U.S. Dep't of Health and Human Service, *Achieving the Promise: Transforming Mental Health Care in America* (2003) 4

U.S. Dep't of Health and Human Services, *Mental Health, United States, 2004* (Ronald W. Manderscheid et. al. eds., 2006) 3

U.S. Dep't of Health and Human Services, U.S. Public Health Serv., *Mental Health: A Report of the Surgeon General* (1999). 3

INTEREST OF THE AMICI CURIAE

Petitioner, the Estate of Mary Lowe, seeks a writ of certiorari to the Supreme Court of Illinois in this case. Amici,[2] Mental Health America (MHA) and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic (Mental Health Project) support the petition for certiorari because of the significant impact of the Supreme Court of Illinois's decision on individuals with mental illness.

MHA is comprised of mental health professionals, current and former consumers of mental health services, their family members, and concerned citizens. MHA's goal is to promote mental health, prevent mental illness, and improve the law relating to people with mental illness. MHA is a primary source of referral and educational material for a wide variety of people, from family members to mental health professionals and legislators.

The Mental Health Project has provided legal counsel to individuals with mental illnesses for over twenty-five years. It seeks to improve the law as it relates to individuals with mental illnesses, and it works to better the treatment of individuals with mental illnesses, both inside and outside mental health facilities.

Amici seek to explain how individuals with mental illness will be adversely affected if the

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[2] This brief was not authored in any part by a party to the proceeding. No person or entity other than Amici made a monetary contribution to the preparation or submission of this brief.

decision of the Supreme Court of Illinois is allowed to stand.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Illinois conflicts with this Court's due process precedent. If it is allowed to stand, persons with mental illnesses will not be afforded due process of law in property forfeiture proceedings. When a person responsible for giving notice in a tax sale or property forfeiture proceeding receives new information suggesting that notice was not received because the property owner is hospitalized, *Jones v. Flowers*, requires that person "take[] additional reasonable steps" to notify the property owner." 547 U.S. 220, 234 (2006).

ARGUMENT

I. THE SUPREME COURT OF ILLINOIS'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *JONES V. FLOWERS* BY ALLOWING PARTIES RESPONSIBLE FOR GIVING PROPERTY OWNERS NOTICE OF IMPENDING FORFEITURE TO IGNORE INFORMATION NECESSARY TO LOCATE THE OWNER.

The question of greatest importance to Amici is whether the party required to provide constitutionally sufficient notice may ignore an undelivered, returned notice, which contains new information indicating that the property owner is hospitalized simply because the party took some reasonable steps to provide actual notice before

learning of the hospitalization. Assuring that property owners are given notice of impending forfeiture is especially important to Amici because of the additional barriers mentally ill individuals face in obtaining affordable housing.

National epidemiological surveys estimate that 22 to 23 percent of the United States adult population, or 69 million people[3], have a diagnosable mental disorder. U.S. Dep't of Health and Human Services, U.S. Public Health Serv., *Mental Health: A Report of the Surgeon General* 46 (1999). While only a small portion of individuals with mental illness may be hospitalized in a given year, the number of hospitalized individuals is still quite large and the number at risk for hospitalization is even larger. After eight years of decreasing levels of hospitalization, the number of individuals hospitalized for mental illness increased in 2002 to 180,543. U.S. Dep't of Health and Human Services, *Mental Health, United States, 2004* Table 19.5 (Ronald W. Manderscheid et. al. eds., 2006). Furthermore, approximately 7.8 million adults have a "severe and persistent" mental illness, *see Report of the Surgeon General* at 46, and may be at risk for hospitalization if they experience a mental health crisis that cannot be resolved in a community treatment setting. *id.* at 287.

Consumers of mental health services are more apt to benefit from treatment when they have

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[3] Population estimates based on United States Census Bureau population estimates for July 1, 2006 of 299,398,484. http://www.census.gov/popest/states/NST-ann-est.html.

housing in place. *See* President's New Freedom Commission on Mental Health, U.S. Dep't of Health and Human Service, *Achieving the Promise: Transforming Mental Health Care in America* 42 (2003). The President's New Freedom Commission on Mental Health has recognized that "the lack of decent, safe, affordable, and integrated housing is one of the most significant barriers to full participation in community life for people with serious mental illnesses" and that "the shortage of affordable housing and accompanying support services causes people with serious mental illnesses to cycle among jails, institutions, shelters, and the streets." *Id.* at 30. When failure to take reasonable steps to provide a mentally ill homeowner with notice of the impending forfeiture of his or her home results in the loss of that home, alternative housing may be unavailable. Assuring that property owners' due process right to notice of forfeiture is preserved will benefit individuals with mental illness by increasing the opportunities for them to remain in their homes. Consequently, it will promote recovery, prolong remission and allow mentally ill homeowners to remaining within their communities.

In the case at bar, the Supreme Court of Illinois held that once a person responsible for giving notice of an impending forfeiture has established and pursued one theory for the failure of notice, additional information strongly suggesting another reason for the inability to provide notice does not create obligation to use that information. *In re Application of the County Collector*, 876 N.E.2d 941 (Ill. 2007). Apex Tax Investments (Apex), the party responsible for providing the property owner, Mary

Lowe, of the impending forfeiture of her home, learned of Lowe's hospitalization through a notation from her mail carrier written on the envelope of the certified letter of notice sent to Lowe from the Sheriff. (Pet. for Cert. at 9.) The notation stated "Person is Hospitalized" and included the mail carrier's initials and route number. (Pet. for Cert. at 7.) The Supreme Court of Illinois reasoned that Apex was not required to inquire further into Lowe's location upon receiving the envelope because Apex had previously taken additional steps to notify her. 876 N.E.2d at 953. Such reasoning is inconsistent with this Court's recent decision in *Jones v. Flowers*, 547 U.S. 220 (2006).

Apex's acquisition of information indicating Lowe's hospitalization and subsequent failure to follow-up on that information is no different than the scenario in *Jones* of the Commissioner handing a stack of mail to a postman and then watching the postman accidentally drop the letters down the drain. 547 U.S. at 229. The *Jones* Court explained that "[n]o one desirous of actually informing the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.'" *Id.* Yet, that is exactly what Apex did when it learned of Lowe's hospitalization. Apex did nothing.

The parties and Amici agree that Apex did more than necessary under Illinois law to locate Lowe prior to learning of her hospitalization. However, the notated envelope was the last piece of information Apex received in their attempts at notice. (Pet. for Cert. at 7-10.) *Jones* requires that when the party responsible for providing notice receives information suggesting that their attempts

at notice have failed, that person must "take[] additional reasonable steps to notify [the property owner]" and that "[w]hat steps are reasonable in response to new information depends on what the new information reveals." 547 U.S. at 234.

When new information reveals that the intended recipient of notice is hospitalized, along with whom to contact for additional details, due process cannot be satisfied by prior attempts to locate the property owner that did not take this new information into account. The Supreme Court of Illinois supports its conclusion that Apex was not required to conduct further investigation into Lowe's whereabouts by explaining that "[t]he information available to [Apex's agent] was that the property was vacant and that Lowe had moved" and that Apex had also checked phone directories and voter registration records. *In re Application of the County Collector*, 867 N.E.2d at 953. However, the additional attempts at locating Lowe occurred before Apex acquired the information about Lowe's hospitalization and likely reason for the failed notice attempts. Under the Supreme Court of Illinois's reasoning, the party responsible for providing notice is free to ignore new information so long as he took additional steps to provide notice before obtaining new information. *Jones* does not permit this outcome when, as in this case, "reasonable additional steps" can be taken to provide notice.

The Supreme Court of Illinois's decision presents unique problems for property owners confined in mental hospitals. Apex's determination that Lowe had moved was perfectly consistent with the reality that she was hospitalized at Tinley Park

Mental Health Center (TPMHC). Lowe had moved, temporarily and for an indeterminate time, to TPMHC. However, the often sudden and unexpected nature of hospitalization for psychiatric treatment makes it unlikely that someone attempting to locate a hospitalized individual will find new contact information for that person through the traditional process of searching phone directories and public records.

The average length of stay at TPMHC in Illinois State Fiscal Year 2006 was 287 days. Illinois Department of Human Services, Office of Mental Health and Developmental Disabilities, *Illinois Statistics Fiscal Year 2006*, 12 (2006). Lowe's hospitalization at TPMHC during the time at issue in this case lasted for 477 days. (Pet. for Cert at 5.) A person hospitalized for an acute medical illness may be in and out of the hospital in the time that mailed delivery of notice would be re-attempted. Someone hospitalized in a State mental health center may be hospitalized during the entire period in which notice is attempted. If the person responsible for providing notice is permitted to ignore information about a property owner's hospitalization, anytime a property owner subject to forfeiture proceedings is confined at a mental hospital they are at a high risk of losing their property without adequate notice.

II. THE SUPREME COURT OF ILLINOIS MISAPPLIED JONES BY FAILING TO DETERMINE IF APEX COULD HAVE TAKEN ADDITIONAL STEPS TO SERVE NOTICE ON LOWE

The Supreme Court of Illinois mischaracterized the goal of the additional steps to provide notice required by *Jones*. The court declined to reverse their earlier holding in this case in part because they did not believe that "had Apex followed up on [the mail carrier's] notation, Apex would have discovered where Lowe was hospitalized and that Lowe was mentally incompetent." *In re Application of the County Collector*, 867 N.E.2d at 953. Under *Jones*, the purpose of taking additional steps is to "increase the likelihood that the owner [will] be notified." 547 U.S. at 235. It is not to identify a specific location where a property owner can be notified or to determine that a property owner is incompetent.

The response to a postman dropping a stack of notice letters into a storm drain is for the person responsible providing notice to send out a new batch of letters. *Id.* at 229. *Jones* does not require that all of the new letters reach their intended recipients in order to satisfy due process. Similarly, *Jones* does not require that Apex take steps to verify that Lowe was confined at TPMHC or that she was mentally incompetent. *Jones* only requires that Apex send out another letter to an address determined by taking into account the new information that Lowe was hospitalized. *Jones* imposes no obligation on Apex to assure that the letter will be received or that the intended recipient is mentally competent.

Jones requires that the additional reasonable steps taken after new information is received about the failure of previous notice attempts be related to the new information received. *Id.* at 234. In this case, the additional reasonable steps that Apex could have taken included contacting the post office to determine if they had additional information about Lowe's hospitalization or could put Apex in touch with the mail carrier who made the envelope notation.

The Supreme Court of Illinois assumed that Lowe's mail carrier could not release any information about her hospitalization because the mail carrier "did not explain what postal forms would have authorized disclosure that Lowe was hospitalized in the Tinley Park Mental Health Center." *Id.* The parties and Amici agree, and the trial court testimony reflects (Pet. for Cert. at 12), that the mail carrier knew the location of Lowe's hospitalization and that both she and the branch post office could provide that information to anyone who asked. Furthermore, the Public Guardian located the mail carrier and obtained information about the location of Lowe's hospitalization by following the information in the envelope notation.

Jones does not allow the person responsible for providing notice of an impending forfeiture to do nothing when they obtain information indicating that their attempts at notice have failed and there are reasonable additional steps that can be taken to increase the likelihood of successful notice. Because Apex could have taken the reasonable additional step of following up on the envelope notations indicating that Lowe was hospitalized, and such follow up

would have required only a phone call, due process requires that they take that step. Instead, Apex failed to take any additional steps upon learning of Lowe's hospitalization and, without constitutionally required due process, Lowe lost her home.

CONCLUSION

For the foregoing reasons, Amici support the petition for certiorari.

Respectfully submitted,

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MOTION FILED

AUG 17 2007

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No. 07-56

IN THE

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ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
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Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTIONS FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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August 17, 2007

No. 07-56

In the
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APEX TAX INVESTMENTS, INC., AND JOHN HERNDON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

Motion of the Sargent Shriver National Center on Poverty Law, the Legal Assistance Foundation of Metropolitan Chicago, and the Lincoln Legal Foundation for Leave to File Amicus Brief in Support of Petition for Writ of Certiorari

The Sargent Shriver National Center on Poverty Law, the Legal Assistance Foundation of Metropolitan Chicago, and the Lincoln Legal Foundation move, pursuant to United States Supreme Court Rule 37, for leave to file an amicus brief in support of the petition for writ of certiorari filed by the Estate of Mary Lowe in the above-referenced case on July 13, 2007.

In support of this motion, movants state as follows:

1. Movants sought consent to the filing of this amicus brief from all parties
2. Barry Sullivan, attorney for petitioner, consented. Mr. Sullivan's written consent is attached to this motion as Exhibit A.
3. Deborah King, one of the attorneys for John Herndon, consented. Ms. King's written consent is attached to this motion as Exhibit B.
4. Denise Brewer, one of the attorneys for respondent John Herndon, has not responded to movants' request for consent to the filing of this amicus brief.
5. Jonathan Smith, attorney for respondent Apex Tax Investments, Inc., has not responded to movants' request for consent to the filing of this amicus brief.
6. As more fully set out in the amicus brief, the Sargent Shriver National Center on Poverty Law's interest in this case is that it, as a not-for-profit public interest law office that represent low-income people, it is concerned with the power of government to interfere with property rights and the nature of due process protections.
7. As more fully set out in the amicus brief, the Lincoln Legal Foundation's interest in this case is that, as an all-volunteer public-interest law center, it defends market freedoms and seeks to vindicate rights of individuals to own private property.
8. As more fully set out in the amicus brief, the Legal Assistance Foundation of Metropolitan Chicago's interest in this case is that, as the Midwest's largest provider of free legal services to the poor in civil matters, much of its practice is devoted to saving its client's homes.

Wherefore, the amici curiae respectfully request that the Court grant it leave to file it Brief in Support of Petition for Certiorari instanter.

Respectfully Submitted,

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August 17, 2007

IN THE SUPREME COURT OF THE UNITED STATES

I hereby grant my consent to Sargent Shriver National Center on Poverty Law and Legal Assistance Foundation of Metropolitan Chicago to submit an *amicus curiae* brief on the Petition for a Writ of Certiorari to the Supreme Court of Illinois in the case of:

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND SUPERVISED ADMINISTRATOR,

Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,

Respondents.

Signed,

Barry Sullivan
Jenner & Block LLP
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Chicago, IL 60611
Counsel of Record for Petitioner

Exhibit A

In the
Supreme Court of the United States
No. 07-86

Estate of Mary Lowe, by Robert F. Harris, Cook County Public Guardian and Supervised Administrator, Petitioner,

v.

Apex Tax Investments, Inc., and John Herndon, Respondents.

Consent to Filing of Amicus Brief

The undersigned attorney for respondent, John Herndon, consents to the filing of an amicus brief in the United States Supreme Court on behalf of the Sargent Shriver National Center on Poverty Law, the Legal Assistance Foundation of Metropolitan Chicago, and the Lincoln Legal Foundation in support of the petition for writ of certiorari filed by the Estate of Mary Lowe in the above-referenced case on July 13, 2007.

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Exhibit B

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STATEMENT OF INTEREST[1]

Sargent Shriver National Center on Poverty Law The Sargent Shriver National Center on Poverty Law ("Shriver Center") is a not-for-profit public interest law office that represents low-income people without charge in civil matters and uses policy development, advocacy, communications and litigation to fight poverty and improve opportunity. Established in 1967 under the name National Clearinghouse for Legal Services, the Shriver Center has consistently sought to improve the conditions of people in poverty and formulate and advocate for solutions to the conditions that cause and perpetuate poverty. Generally, as part of many of its initiatives, the Shriver Center has been concerned with the power of government to interfere with property rights and the nature of due process protections interposed between those rights and a proposed interference with them.

Specifically, the Shriver Center considers affordable decent housing as a core component of family economic security. It is an important factor in success in school, employability, productivity, and creation of strong communities of opportunity. The Shriver Center has a special project focused on the preservation of affordable housing, has litigated issues of the sufficiency of notices in the context of foreclosures and tax sales, and has had a national project to prevent mortgage foreclosures and save home ownership.

In addition, the Shriver Center has a special project operated within its Community Investment Unit, that is focused on the importance of asset-building in attacking poverty, now and across generations. As co-chair of the

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[1] Counsel for none of the parties authored any part of this amicus brief. No person or entity other than the amici curiae, their members, and counsel, made a monetary contribution to the preparation or submission of the brief.

Illinois Asset Building Group, the Shriver Center is leading an advocacy effort to promote savings and retirement income and home ownership. At the core of these activities is the position that home ownership is one of the most important strategies for economic stability, upward mobility, and transmission of wealth to the next generation. The tax delinquency system is a threat to home ownership and the related asset-building goals, and the Shriver Center has a strong interest in making sure that the system features the strongest possible due process protections, particularly for the low-income, elderly, or infirm populations most exposed to harm.

The Lincoln Legal Foundation The Lincoln Legal Foundation ("LLF") is an all-volunteer public-interest law center that defends market freedoms and seeks to vindicate rights of individuals to own private property. LLF observes that individual and family home-ownership is a crucial means of advancement out of poverty and a bulwark against descent into poverty. LLF is interested, therefore, in ensuring that the authority of governments to seize private homes is highly limited, being permitted only for actual public use or when other circumstances make it truly necessary, and strictly conditioned upon conformity to due process requirements. In the context of real property tax administration, this interest strongly favors imposition upon the tax collector the burden of showing that due process has been accorded, rather than imposing upon the tax payer the burden of showing that due process has been denied.

The Legal Assistance Foundation of Metropolitan Chicago The Legal Assistance Foundation of Metropolitan Chicago (LAF) is the Midwest's largest provider of free legal services to the poor in civil matters. Each year, LAF provides legal advice and representation to over 30,000 people. Much of LAF's practice is devoted to saving our

client's homes. This work is supervised and coordinated by our Home Ownership Preservation Project, which is itself the leading legal advocacy unit on homeownership preservation issues in the Chicago metropolitan area. Through its work of 40 years, LAF is intimately familiar with the many due process issues raised by state action seeking to deprive poor people of their various property rights. Over the past decade our Home Ownership Preservation Project has applied that institutional knowledge and its technical expertise to save hundreds' of clients homes, and to help others (through community education, training, outreach, and policy advocacy) to save thousands more. Through all of its work, LAF is particularly aware of the value of homeownership to low-income families and to urban communities seeking to maintain neighborhood stability.

SUMMARY OF ARGUMENT

In *Apex Tax Investments, Inc. v. Lowe (In re County Collector)*, 867 N.E.2d 941 (Ill. 2007), the Illinois Supreme Court approved the termination of an infirm elderly woman's ownership of her home. In doing so, the *Lowe* decision construed this Court's recent decision in *Jones v. Flowers*, 547 U.S. 220 (2006), so narrowly as to make it inapplicable to any other factual scenario, leaving homeowners throughout Illinois without the benefit of *Jones*.

The tax delinquency system is vulnerable in many ways and rife with errors, with high potential for property owners to unfairly lose their homes and for tax buyers to reap windfalls.

1. Senior citizens are particularly vulnerable to loss of their homes when they do not receive adequate notice of delinquent tax issues.

2. Tax deeds are issued when the delinquent taxes are a tiny fraction of the home's estimated value, underscoring the fairness of fact-specific notice and indicating that notice is often a real chance for even the lowest income property owners to preserve the property.

3. Mortgage companies responsible for paying property taxes as a part of the mortgage agreement sometimes fail to do so, and this underscores the need for adequate notice so that homeowners can correct the mistakes of others.

4. Bureaucratic errors of local taxing bodies put owners at risk of losing their homes for delinquent property taxes, emphasizing the need for great care in providing notice to the homeowners.

5. The death of the original homeowner leaves the heirs and/or relatives in need of careful notice requirements regarding a property tax delinquency.

In Illinois and elsewhere, over the last decade, local governments have increasingly gone to the private sector to assist in the collection of property taxes. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 751 (2000). Unlike the government, whose sole interest is the payment of taxes when it holds a tax lien, the private party's interest is in maximizing the return on its investment. *Id.* at 794. *See Slattery v. Friedman*, 636 A. 2d 1, 17-18 (Md. Ct. Spec. App. 1994) (recognizing that "the holder of the certificate of sale has little incentive to locate the owners of the property, and will often benefit if the owners are not located"). Thus, in cases like Ms. Lowe's strict due process principles are needed.

In Cook County, Illinois, alone, a total of 118,423 properties were sold at annual tax sales, and a total of 28,448 were sold at biannual tax scavenger sales, for a total of 146,871 sales, for the period 2000 through 2005. For many thousands of these properties, the sold taxes were not redeemed prior to the point in the process where the tax purchaser had the right to file a petition for a tax deed. For the period 2002 through 2006, tax purchasers filed a total of 30,089 petitions, or 6,017 per year. Finally, though many of these properties were subsequently redeemed, many of them were not. Specifically, for the period January 1, 2003, through July 31, 2007, the Office of the Cook County Clerk reports that 13,758 tax deeds were issued (for an annual average of over 3,000). In each such case title was conveyed to the tax buyer.

When a person's home is at stake, it is not too much to ask that local government and the tax sale industry exert themselves to provide notice calculated to reach the homeowner in the circumstances of each case. The Due Process Clause is a curb on the power of government, requiring a level of care that is respectful of this most important property interest, a person's home. This Court should grant certiorari.

ARGUMENT

I. Without the Court's Intervention, the Ruling in *Lowe v. Apex Tax Investments* Will Result in People Losing Their Homes, When They Could Have Saved Their Homes if There Had Been Adequate Notice.

In *Apex Tax Investments, Inc. v. Lowe (In re County Collector)*, 867 N.E.2d 941 (Ill. 2007), the Illinois Supreme Court approved the termination of an infirm elderly woman's ownership of her home. The court determined that a tax purchaser's provision of notice of its petition for a tax deed satisfied due process, even though the tax purchaser failed to follow-up on new information that it obtained, which informed the tax purchaser that the home owner did not receive notice and provided information about how that owner might be found. In doing so, the *Lowe* decision construed this Court's recent decision in *Jones v. Flowers*, 547 U.S. 220 (2006), so narrowly as to make it inapplicable to any other factual scenario, leaving homeowners throughout Illinois without the benefit of *Jones*.

Jones affirmed the longstanding constitutional principle first articulated in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950): the sufficiency of notice to a party regarding an impending threat to ownership of his or her home depends on the surrounding circumstances. Consequently, whether notice of a proceeding satisfies due process is fact-specific. The fact-specific nature of notice requirements protects the most vulnerable in our society, who may be less likely to receive actual notice of proceedings affecting them under formulaic and not fact-specific notice procedures. Without this Court's intervention, the *Lowe* decision will render *Jones*

meaningless, as well as the constitutional protections outlined in *Mullane* and its progeny.

Tax sales and tax deed actions are not trivial events. Rather, they trigger the significant and sometimes irreversible prospect of the loss of a home. *Vosilla v. Rosado,* 944 So. 2d 289, 301 (Fla. 2006). "The right to own property is one of the fundamental rights that a citizen enjoys under our American system of government." *Don. S. Co., Inc. v. Roach*, 285 S.E.2d 491, 495 (W. Va. 1981). While the state has a right to condition the enjoyment of that right upon the payment of taxes, due process requires notice to the landowner before foreclosing on his or her property interest because of allegedly delinquent taxes. *Id.* At play in this case are the fundamental constitutional rights to the preservation of one's property, and to one's very life and liberty. *Malone v. Robinson,* 614 A.2d 33, 35-36 (D.C. 1992). Such vital interests require strict adherence to due process requirements. *Id.*

As is set forth below, the tax delinquency system is vulnerable in many ways and rife with errors. The potential for property owners to experience great loss and for tax buyers to get windfalls underscores the importance of constitutionally sufficient notice in these cases. Due process protections are even more crucial in such cases for vulnerable populations like the elderly, poor, and the physically or mentally ill, who find it much more difficult to diligently protect their property interests than other taxpayers.

A. Property Owners across the Country Are Threatened with the Loss of Their Homes Because They Did Not Receive Proper Notice of Delinquent Property Taxes.

The *Lowe* decision cripples the fundamental due process notice protections that *Jones* affords homeowners.

The parties affected by tax deficiency cases come from all walks of life. In many cases, certain life circumstances have diminished their ability to protect their property interests or have limited their access to notice that their homes are about to be taken. They are senior citizens, who prize their homes as their sanctuary, resting place, and largest investment; or adult children of such senior citizens who struggle to manage their parents' interests, often from afar. They are mentally ill or physically incapacitated individuals, such as Ms. Lowe, who may be unable to appreciate the gravity of their current situation. They are homeowners reasonably relying upon mortgage companies to properly pay their property taxes. And they are all of the property tax payers nationally, at the mercy of a taxing body's bureaucratic errors and snafus.

To demonstrate the wide variety of situations where notice of a tax delinquency is not properly provided, and thus where careful and fact-specific notice requirements are necessary, we present a sampling of cases from across the country:

1. Senior citizens, who have typically satisfied their homes' mortgages, are particularly vulnerable to losing their homes to delinquent property taxes when they do not receive notice:

Nathaniel Kyle: Washington D.C. resident Nathaniel Kyle's story is similar to that of many elderly citizens throughout this country. Mr. Kyle and his wife lived in a modest home in Washington D.C. for half of a century and raised four children there. *See* Mary Beth Sheridan, *Some Seniors Unaware of Risk to Homes; City to Start Auctioning More Than 6,000 Tax-Delinquent Properties Next Week*, WASHINGTON POST, July 11, 2002, at T3. In 1999, shortly after his wife died, Mr. Kyle received a terrible shock: his home had been sold at a city tax sale

several years earlier for less than 10% of its value. *Id.* The city failed to notify Mr. Kyle of the tax sale. *Id.* Mr. Kyle claimed to have diligently paid his taxes, but the local government had no record of that. *Id.* Only with legal assistance was he able to regain possession of his home.

Buck and Robbie Jones: Buck and Robbie Jones, a severely ill elderly couple in Arkansas, never imagined their golden years would be spent trying to save their family home. *See* David Hughes, *Bill Offered to Prevent Sale of Homes Without Notice*, ARKANSAS DEMOCRAT-GAZETTE (Little Rock, Ark.), March 1, 2003 at 17. The couple suffered from debilitating emphysema and stomach cancer. *Id.* The first notice they received of a problem with the property taxes was a letter from the new owner telling them to leave. *Id.* In a federal lawsuit filed in 2003, the couple alleged that the new owner actually intercepted certified mail from the local government notifying them of the delinquencies. *Id.* Regardless, the Arkansas Supreme Court affirmed a January 2002 ruling that state law only requires that the land commissioner notify a delinquent property taxpayer by certified letter even if the person to whom the letter is addressed never receives it. *Jones v. Double "D" Props.*, 98 S.W.3d 405, (Ark., 2003), aff'd 176 Fed. Appx. 401, (2006).

Ruby Benton: Ruby Benton purchased a home in 1967 and lived there for over twenty years. *Benton v. Logan*, 474 S.E.2d 446, 447 (S.C. Ct. App. 1996). In 1990, Ms. Benton was moved to a nursing home. *Id.* at 446. Her grandson forwarded her mail to the nursing home. *Id.* In 1991, a property tax bill, sent to her house, went unpaid. *Id.* at 447. Follow-up certified and registered mail notices of the delinquency were sent to the home. *Id.* All of the notices were returned to the treasurer indicating that either the forwarding order had expired or the mailings were

unclaimed. *Id.* Unlike the Illinois court here, the Arkansas appellate court in Benton affirmed the trial court's decision to void the tax deed, concluding that the returned mails' notation that the forwarding order had expired was a clear indication that someone had moved, and "a more recent and better address" was out there. *Id.* at 448. The court found that due diligence required more action to be to taken. *Id.*

2. In some cases the unpaid property taxes represent a mere fraction of the home's estimated value, underscoring the fairness of fact-specific notice and indicating that notice is often a real chance for even the lowest income property owners to preserve the property:

Kermit Atwood and Dolores Touchstone: Hurricane Katrina was not the only disaster that threatened Kermit Atwood and Dolores Touchstone's Louisiana home. A $1.63 delinquent 1996 property tax bill had been quietly eating away at their ownership of the home. *See* Charlie Chapple, *Fighting for their home; Slidell family's residence was sold at auction because of a $1.63 tax bill they didn't even know about*, TIMES PICAYUNE (New Orleans, La.), July 15, 2007, at 1. The local government had sent out the tiny bill with the wrong address, and that error eventually led to the property being sold at a sheriff's tax sale. *Id.* The family's ordeal finally ended this year, when an anonymous donor settled the lawsuit brought by the tax buyer. *See* Charlie Chapple, *Tax lien nightmare ends in Slidell; Local man pays to settle suit over house*, TIMES PICAYUNE (New Orleans, La.), July 18, 2007, at 1..

Helen McCann: Helen McCann lost her 30-year residence worth $175,000 for $864 in unpaid property taxes. *In re McCann v. Scaduto*, 519 N.E. 2d 309, 311 (N.Y. 1987).

Even though Ms. McCann's name and address were known to the County, efforts were only made to notify her by publication. *Id.* Eventually, Ms. McCann was notified by certified mail, but with only three months left to redeem her property. *Id.*. The Court noted that "substantial interest, penalties and expenses accrue upon [the tax] sale" and that "[t]hese costs cannot be shrugged off as insignificant consequences, particularly for persons such as petitioner McCann subsisting on Social Security payments and a weekend job delivering magazines, and particularly when measured against the negligible cost and burden that would be imposed on the County if it were required to mail a notice to her." *Id.* at 314.

Lois Holdcraft Spencer: Shortly before her death, Mrs. Lois Holdcraft Spencer's property was sold at a tax sale for $12.60. *Spencer v. James*, 955 So. 2d 1287, 1289 (La. Ct. App.. 2007). Prior to the sale, Mrs. Spencer had been in failing health, moved to an assisted living facility, and gave her son responsibility for handling her business affairs. *Id.* Neither Ms. Spencer nor her son received notice of the property tax delinquency. *Id.*

3. Mortgage companies responsible for paying property taxes as a part of the mortgage agreement can contribute to problem of delinquent property taxes and unsuspecting homeowners, and this underscores the need for adequate notice so that homeowners can correct the mistakes of others.

At times, mortgage companies do not pay the property taxes, pay the incorrect amount, pay the taxes for another homeowner, experience backlog, or fail to receive notice themselves of homeowner's property tax obligation. *See* Beth Hahn, *Tax Bills Sent Directly to Owners*,

ALBUQUERQUE JOURNAL, November 9, 2006, at A8; *see also* Lisa W. Foderaro, *Nightmare: Owner Awakes as Tenant*, THE NEW YORK TIMES, February 4, 2000, at B8.

Joseph and Mary Tunstall: Joseph and Mary Tunstall lost their home because their mortgage company, responsible for paying the Tunstall property taxes, failed to pay the taxes in 1966. *Curtis Bldg. Co., Inc. v. Tunstall*, 387 A.2d 1370, 1371 (Pa. Cmmw. Ct. 1978). Through their mortgage company, the Tunstalls had paid all of their property taxes for the years 1961 through 1971, with the exception of 1966. *Id.* A representative of the mortgage company was unable to explain the failure the pay in 1966. *Id.* The house was purchased in a tax sale for $424.00. *Id.*

Marshall and Cindy Parks: The Parkses were shocked when a tax scavenger showed up at their home claiming to own the property. *Parks v. Wells Fargo Home Mortgage Co., f/k/a Norwest Mortgage, Inc.*, 398 F.3d 937, 940 (7th Cir. 2005). The Parkses later learned that although they had made all of their mortgage payments, the mortgage company had failed to pay property taxes on the residence for one month, because it failed to recognize a change in tax identification numbers on their residence. *Id.* at 939-40. As a result, the Parkses became embroiled in a legal battle to save their home. *Id.* at 940.

There are an alarming number of similar cases, where mortgage companies fail to pay property taxes as per their contractual obligations, and homeowners either lose their homes or are dragged into lengthy legal battles. *See, e.g.*, *Choi v. Chase Manhattan Mortgage Co.*, 63 F. Supp. 2d 874 (N.D. Ill. 1999) (finding mortgage company failed to pay property taxes and failed to rectify the delinquency, resulting in tax sale of homeowner's property); *Davis v. Dime Sav. Bank of New York, FSB*, 158 A.D.2d 50 (N.Y.

App. Div. 1990) (finding homeowner's allegations sufficient to state a claim for fraud where mortgagee bank failed to pay property taxes pursuant to escrow arrangement and then misrepresented to homeowner that they had been paid); *Thunderbird Motel Corp. for Review of Real Estate Taxes v. County of Hennepin*, 183 N.W.2d 569 (Minn. 1971) (affirming reinstatement of taxpayer's petition for review of property taxes where mortgagee collected funds from homeowner to pay property taxes, but then failed to pay).

4. Bureaucratic errors of local taxing bodies further put owners at risk of losing their homes for delinquent property taxes, emphasizing the need for great care in providing notice to the homeowners.

Various bureaucratic errors by local taxing bodies have resulted in property owners losing their homes, including sending property tax notices to incorrect addresses.

Julio and Nannette Rosado: Julio and Nannette Rosado moved to a second home in Florida in 1998. *Vosilla*, 944 So. 2d at 291 After they moved, the Rosados twice informed the taxing authorities of their change in address. *Id.* at 300. The Rosados also informed the tax collector that a legally incapacitated relative and non-English speaking caretaker continued to reside at their original home. *Id.* at 291. Nonetheless, the tax assessment roll was not updated to include the new information. *Id.* at 292. Shortly after the Rosados sent their second notice of their change of address, the holder of the tax certificate sought a tax deed to the home pursuant to Florida law and notice of the tax deed petition was sent to the original home address. *Id.* at 292. The property was later sold at a tax deed sale and an

action was brought to quiet title to the property. *Id.* Litigation ensued, and the Florida Supreme Court eventually found in favor of the Rosados. *Id.* at 300-01. Noting the trial court's finding that the Rosados' failure to receive notice was "completely the fault of the taxing agencies," the Florida Supreme Court found that the clerk should have verified that the change of address had been submitted. *Id.* at 300.

The following facts and examples demonstrate the prevalence of bureaucratic errors like that which threatened the Rosado home:

- Jeremiah Davison lost his Chicago, Illinois home in a tax sale. The county government apparently had the wrong address. Consequently, Mr. Davidson did not receive notice of the delinquent taxes in time to save his home. *See* Kristen McQueary, *Fight for house finally ends; Man who never saw notice of taxes loses home*, CHICAGO SUN-TIMES, November 22, 2004, at 10.
- In October 2003, almost 3,000 of the 80,000 property tax bills sent to Santa Fe County, New Mexico residents were returned because of incorrect addresses, especially in rural areas where the routes have changed. *See* Gary E. Salazar, *Property Tax Bills Returned to Sender*, ALBUQUERQUE JOURNAL, November 14, 2003.
- Similarly, almost 25,000 of 822,000 property tax notices sent by the Appraiser's Office in Broward County, Florida were returned as undeliverable, due to incorrect addresses, old addresses, post office errors, or errors in the database. *See* Jennifer Mooney Piedra, *Tax Notices Back in the Mail: About 25,000*

Property Tax Notices Were Returned to the Broward Property Appraiser's Office as Undeliverable, MIAMI HERALD, September 13, 2006.

5. The death of the original homeowner leaves the heirs and/or relatives in need of careful notice requirements regarding a property tax delinquency.

Elliot Malone: After Elliot Malone's parents died in 1976, he became their sole heir and executor. *Malone* 614 A.2d at 35. Mr. Malone paid off the home's mortgage and lived in the house for several years until he decided to move closer to his work. *Id.* After he moved, he continued to stop by his parents' home once a week and receive mail there. *Id.* When Mr. Malone received notice of a registered letter to his parents, he attempted to retrieve it from the post office. *Id.* The post office would not release it to him. *Id.* Mr. Malone believed that he was current on the property taxes for the family home. *Id.* Other registered mail attempts to the owners of the property were returned unclaimed. *Id.* The first notice he received that there was a problem with the property taxes was a copy of a tax deed pinned to the front door. *Id.*

Anna B. Pearson: Anna B. Pearson's grandchildren had to sue the City of Kingsport, Tennessee to regain possession of their grandmother's home. *Freeman v. City of Kingsport*, 926 S.W.2d 247 (Tenn. Ct. App. 1996). The City had sent certified mail notice of a suit for property tax delinquency to their deceased grandmother. *Id.* at 247. When the notice was returned with the notation that owner was deceased, the City provided notice by publication but took no other steps to identify the current property owners. *Id.* A default judgment was entered and the property was

eventually sold for $410, the amount of unpaid property taxes. *Id.* at 247-48. *See also Bryant v. T.C.B. Enterprises*, 395 So. 2d 823, 826 (La. Ct. App. 1981) (Noting that although the tax collector knew that there were several heirs with an ownership interest in the property, but it was their practice to only mail notice of property taxes to the first heir listed on the assessment rolls).

B. The Court Must Be Particularly Vigilant in Protecting the Property Interests of Homeowners When Private, Profit-Motivated Parties Are Notifying Homeowners.

Under the Illinois system, the tax purchasers in this case had a strong financial incentive *not* to locate the homeowner. In order to counteract that incentive such a system must have stringent government-enforced notice requirements to avoid injustice. In Illinois and elsewhere, over the last decade, local governments have increasingly gone to the private sector to assist in the collection of property taxes. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 751 (2000). Buyers at tax sale, or tax scavengers, typically seek properties where the amount of delinquent property taxes is a small percentage of the property's fair market value. *Id.* at 774. "Costs associated with notices, advertisements, and judicial proceedings are invariably included in the aggregate amount necessary to clear the delinquency, or redeem the property from a sale. It is precisely these high rates of return attract private investors to the potential purchase of tax liens." *Id.* at 777. Unlike the government, whose sole interest is the payment of taxes when it holds a tax lien, the private party's interest is in maximizing the return on its investment. *Id.* at 794. This was demonstrated when homeowners sued a consortium of tax buyers in Cook County, Illinois, alleging an antitrust conspiracy to drive up

bids (in the form of interest rates earned on taxes sold). During the year in question (1996), rates that had ranged for the past five years from 2% to 8% shot up to 15%. *Alexander v. Phoenix Bond & Indemnity Co.*, 149 F. Supp. 2d 989, 994 (N.D. Ill. 2001).

Actually notifying the interested parties of the pending loss of their property rights does not financially advantage tax scavengers (and tax purchasers). To the contrary, they only reap monetary benefit from their efforts if the owner is either *not* located or unable to pay the delinquent taxes. *See Slattery v. Friedman*, 636 A. 2d 1, 17-18 (Md. Ct. Spec. App. 1994) (recognizing that "the holder of the certificate of sale has little incentive to locate the owners of the property, and will often benefit if the owners are not located"). Consequently, the tax purchaser's counter-interest in providing notice may result in minimum efforts to locate accurate addresses of interested parties. *See also St. George Antiochian Orthodox Christian Church v. Aggarwal*, 603 A.2d 484, 490 (Md. 1990)(stating "we believe an interpretation that would permit a purchaser to engage in deliberate ignorance to the detriment of the owner's interest in the land would be at least constitutionally suspect"); *Kennedy v. Cummings*, 603 A.2d 1251 (Md. Ct. Spec. App. 1992); and *Scott v. Seek Lane Venture*, 605 A.2d 942, (Md. Ct. Spec. App.1992).

Thus, whether profit-motivated private parties engaged in property tax collection will rigidly adhere to constitutional due process obligations is uncertain. For this reason, in Ms. Lowe's case, and cases like hers, the Court must be especially demanding in its application of due process.

C. There are Large Numbers of Cases Similar to Ms. Lowe's

The issue raised in Ms. Lowe's petition has the potential to impact thousands of homeowners each year. While the particular (and particularly tragic) facts of Ms. Lowe's case may not be replicated on a daily basis, the general scenario of a homeowner's failure to receive notice, and the general question of what reasonable follow-up steps are required before taking away someone's home, are common.

Just in Cook County, Illinois, where this case arose, the public records (i.e., the highest case numbers of tax sale cases filed) indicate that a total of 118,423 properties were sold at annual tax sales, and a total of 28,448 were sold at biannual tax scavenger sales, for a total of 146,871 sales, for the period 2000 through 2005. This generates an annual average of 24,478 for all tax sales and an average of 19,737 for annual tax sales.

These numbers are consistent with the figures set forth in *Alexander* antitrust conspiracy case. In that case (which settled), the court found that the total number of annual tax sales held in Cook County, Illinois, for the period 1984 through 1996, was 290,451, for an annual average of 22,342. *Alexander*, 149 F. Supp. 2d at 994.

Moreover, for many thousands of these properties, the sold taxes were not redeemed prior to the point in the process where the tax purchaser had the right to file a petition for a tax deed. For the period 2002 through 2006, the public records (i.e., the highest case numbers of tax deed petitions filed) indicate that tax purchasers filed a total of 30,089 petitions, or 6,017 per year.

Finally, though many of these properties were subsequently redeemed, many of them were not. Specifically, for the period January 1, 2003, through July 31, 2007, the Office of the Cook County Clerk reports that

13,758 tax deeds were issued (for an annual average of over 3,000). In each such case, title was conveyed to the tax buyer. *See* Letter from Fredda Berman and accompanying documents, Office of Cook County Clerk (August 8, 2007) (attached hereto in Appendix A).

As indicated by the numerous preceding examples, issues in this case are vital to thousands of homeowners in Cook County and throughout the nation. When a person's home is at stake, the local government and the tax purchaser must provide notice calculated to reach the homeowner that reflects each case's specific circumstances. The Due Process Clause requires a level of care that respects this most important property interest.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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August 17, 2007

Office of the County Clerk

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August 8, 2007

Daniel P. Lindsay
Supervisory Attorney
Home Ownership Preservation Project
Legal Assistance Foundation of Metropolitan Chicago
111 West Jackson Boulevard—Suite 300
Chicago, IL 60604

Re: FOIA Request

Dear Mr. Lindsay:

Enclosed are documents provided pursuant to your FOIA request regarding tax deeds issued pursuant to court order during the period from January 1, 2003 through to July 31, 2007, the most recent information we have available.

As shown on the enclosed, tax deeds transferring 13,758 properties were issued during the period in question. The issuance date is the date of the court order directing the County Clerk to issue the deed, not the processing date.

I hope this information is helpful. I have waived the copying fee pursuant to your request.

Sincerely,

Fredda R. Berman
Director, Real Estate and Tax Services
Office of the Cook County Clerk

Enclosure

1	18340	414	20-04-408-038-0000	02CD1462	1/3/2003
2	18312	569	16-23-122-037-0000	02CD2011	1/3/2003
3	18311	025	28-03-201-020-0000	02CD834	1/3/2003
4	18311	025	28-03-201-021-0000	02CD834	1/3/2003
5	18311	025	28-03-201-022-0000	02CD834	1/3/2003
6	18316	025	28-03-201-023-0000	02CD962	1/3/2003
7	18313	014	32-18-311-012-0000	02CD815	1/3/2003
8	18310	014	32-19-406-032-0000	02CD816	1/3/2003
9	18315	014	32-19-415-002-0000	02CD1612	1/3/2003
10	18318	014	32-19-415-016-0000	02CD817	1/3/2003
11	18317	014	32-20-302-017-0000	02CD818	1/3/2003
12	18309	266	20-27-318-047-0000	02CD1517	1/6/2003
13	18302	165	16-16-121-006-0000	02CD2070	1/7/2003
14	18338	552	16-11-120-019-0000	02CD1758	1/7/2003
15	18342	552	16-11-131-023-0000	02CD1402	1/7/2003
16	18343	553	16-11-223-008-0000	02CD1404	1/7/2003
17	18347	557	16-13-204-005-0000	02CD470	1/7/2003
18	18331	496	17-04-221-006-0000	02CD1781	1/7/2003
19	18332	496	17-04-221-007-0000	02CD1782	1/7/2003
20	18320	377	19-01-420-055-0000	02CD810	1/7/2003
21	18303	251	20-03-108-021-0000	02CD2500	1/7/2003
22	18341	420	20-09-201-056-0000	02CD1509	1/7/2003
23	18316	350	20-22-408-013-0000	02CD636	1/7/2003
24	18301	268	20-34-117-012-0000	02CD954	1/7/2003
25	18305	224	30-17-202-010-0000	02CD2183	1/7/2003
26	18304	225	30-19-204-023-0000	02CD2182	1/7/2003
27	18314	014	32-19-311-019-0000	02CD1629	1/7/2003
28	18296	368	19-32-208-032-0000	01CD0362	1/9/2003
29	18351	252	20-03-305-006-0000	02CD424	1/9/2003
30	18351	252	20-03-303-007-0000	02CD424	1/9/2003
31	18363	554	16-11-409-029-0000	02CD1407	1/10/2003
32	18364	554	16-11-411-024-0000	02CD1406	1/10/2003

BEST AVAILABLE COPY

13728	30182	211	29-19-118-018-0000	06COTD3704	7/13/2007
13729	30182	211	29-19-119-001-0000	06COTD3704	7/13/2007
13730	30182	211	29-19-119-002-0000	06COTD3704	7/13/2007
13731	30183	211	29-19-119-012-0000	06COTD3696	7/13/2007
13732	30183	211	29-19-119-013-0000	06COTD3696	7/13/2007
13733	30183	211	29-19-119-014-0000	06COTD3696	7/13/2007
13734	30183	211	29-19-119-015-0000	06COTD3696	7/13/2007
13735	30183	211	29-19-119-016-0000	06COTD3696	7/13/2007
13736	30183	211	29-19-119-017-0000	06COTD3696	7/13/2007
13737	30183	211	29-19-119-018-0000	06COTD3696	7/13/2007
13738	30177	013	32-17-408-018-0000	06COTD0486	7/13/2007
13739	30176	016	32-23-122-005-0000	06COTD2334	7/13/2007
13740	30136	023	28-01-300-017-0000	06COTD3622	7/16/2007
13741	30202	466	28-20-103-029-0000	06COTD2528	7/17/2007
13742	30201	291	25-22-304-006-0000	05COTD0635	7/17/2007
13743	30208	197	29-06-416-030-0000	06COTD1455	7/17/2007
13744	30196	578	16-27-202-016-0000	06COTD2191	7/18/2007
13745	30200	501	17-10-219-027-1745	06COTD3597	7/18/2007
13746	30191	165	15-15-234-052-0000	06COTD0858	7/20/2007
13747	30191	165	15-15-234-053-0000	06COTD0858	7/20/2007
13748	30218	549	15-09-209-006-0000	06COTD1942	7/20/2007
13749	30219	553	16-11-310-001-0000	06COTD2484	7/20/2007
13750	30213	130	10-35-330-009-0000	06COTD2130	7/24/2007
13751	30214	155	15-04-204-016-0000	06COTD2127	7/24/2007
13752	30215	155	15-04-301-073-0000	06COTD2126	7/24/2007
13753	30210	546	16-04-412-024-0000	06COTD0591	7/24/2007
13754	30216	487	20-30-222-029-0000	06COTD2328	7/24/2007
13755	30209	481	25-17-318-010-0000	06COTD0689	7/24/2007
13756	30212	024	28-02-215-015-0000	06COTD0979	7/24/2007
13757	30217	194	29-03-202-016-0000	06COTD1048	7/24/2007
13758	30211	011	32-08-201-023-0000	05COTD2131	7/24/2007